No. 90-1680

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Petitioner,

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

* Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
* Counsel of Record

Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether it was clearly established in 1985 that female victims of domestic violence, or domestic violence victims in general, were entitled to equal protection of the law as guaranteed by the fourteenth amendment to the United States Constitution.

2. Whether the active interference by a police officer with a domestic violence victim's access to the courts gives rise to a cognizable deprivation of constitutional rights, and, if so, whether this right was clearly established in 1985.

PARTIES TO THE PROCEEDING

Regina Brown is the sister of Debbie Evans and the administratrix of her estate. She initiated this action in the United States District Court for the District of New Jersey in 1986.

Names of respondents appear in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Regina Brown, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

Review is sought of the opinion reported as *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990), contained in the Appendix at App. 1-57. The order denying rehearing by the court of appeals is reproduced at App. 58-59. The district court's opinion addressing the summary judgment motion filed by respondents appears at App. 60-86.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit, review of which is sought in this petition, was entered and filed on December 31, 1990. App. at 1. Petitioner's request for rehearing was denied on January 29, 1991. App. at 59. The jurisdiction of this Court arises from 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provision at issue in this matter is the fourteenth amendment to the United States Constitution. Petitioner filed this action pursuant to 42

U.S.C. § 1983. The state statutes involved are the provisions of the Prevention of Domestic Violence Act, codified in chapter 25 of the New Jersey Code of Criminal Justice, New Jersey Statutes Annotated (West 1982). The relevant text of the above-mentioned constitutional provision and statutes is set forth in the Appendix at App. 87-103.

STATEMENT OF THE CASE

Facts Of The Case

The facts of this case, which are essentially uncontested, chronicle the events leading to the death of Debbie Evans – a tragedy caused by the deliberate indifference of Roselle police officers to the plight of this female victim of domestic violence and their active interference with her efforts to obtain judicial relief and police protection.

Debbie Evans' ordeal began early in January of 1985, when her former live-in boyfriend Clifton McKenzie, without authorization, left a drug rehabilitation center where he had been sent following a conviction on forgery and drug charges. A few days later while at work, Ms. Evans asked a friend, Jan Parker, to go to her apartment and retrieve her apartment keys from McKenzie. On the afternoon of Wednesday, January 9, 1985, at Ms. Evans' apartment in Roselle, McKenzie savagely attacked and choked Jan Parker until she lost consciousness. McKenzie then abducted Ms. Parker and took her to New York City, where she somehow managed to escape. She obtained assistance from the New York City Housing Authority Police and was taken to a hospital. That same day, Officer

Cornelius Sullivan of the New York City Housing Authority Police telephoned the Roselle Police Department and advised the desk sergeant of the kidnapping and assault of Jan Parker.

Roselle Police Detective Felix Grabowski was assigned to investigate the incident and conducted telephone interviews with Officer Sullivan, an emergency room doctor at Beth Israel Hospital, and Jan Parker herself. Detective Grabowski confirmed that McKenzie had committed the crimes of aggravated assault, kidnapping, and car theft. By his own admission, Detective Grabowski had probable cause to obtain a warrant for the arrest of McKenzie, but he did not do so. Grabowski merely advised Ms. Parker to come to Roselle police headquarters following her release from the hospital and provide a formal statement that would support the issuance of a criminal complaint.

The same day McKenzie had abducted and assaulted Jan Parker, he returned to Roselle and abducted Debbie Evans from the parking lot of New Jersey Bell where she worked. McKenzie commandeered Ms. Evans' car and drove her to the Pulaski Skyway. He stopped in the middle of the bridge, ordered her out of the car and lifted her up, threatening to throw her over the side, while saying, "If I can't have you, nobody else will . . . nobody will ever have to worry about seeing me, or you again." McKenzie, although terrifying Ms. Evans, did not carry out the threat.

McKenzie then drove Ms. Evans back to her apartment, where he held her hostage. For three days, while he kept her in a constant state of fear, he raped and

assaulted her. At one point, he threatened her with a butcher knife while she was eating and told her it would be the last thing that she would do. Later, he took Ms. Evans to a bank and ordered her to withdraw money from her account so that he could feed his drug habit. While confined to her apartment, Ms. Evans was prohibited from answering the telephone and McKenzie constantly monitored her actions.

Debbie Evans' three days of terror ended only when, against McKenzie's instructions, she opened the door of her apartment, where her brother and sister had come searching for her.[1] McKenzie escaped out the bathroom window, taking her purse with him. Ms. Evans, dazed and distraught, cried that she wanted to go home, even though she was standing at the threshold of her own apartment.

Ms. Evans, along with her brother and sister, went directly to the Roselle police station for the purpose of

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[1] Prior to their arrival, Ms. Evans' brother and sister had contacted the Roselle Police several times over the three days she was missing. They had told the police about Jan Parker's abduction by McKenzie and that they feared he also was responsible for their sister's disappearance. The Roselle Police did nothing. Frustrated for days about the lack of police assistance, Ms. Evans' sister telephoned her apartment and became frightened when someone answered and suddenly hung up. Immediately, she called the Roselle Police Department and a patrol car was dispatched to the apartment complex. The patrol unit left without ever ascertaining whether Debbie Evans was in danger because the officers were unable to gain entry into the apartment building. It was after this feeble effort by the Roselle Police that Ms. Evans' brother and sister went to her apartment building, which they easily entered, and rescued her from captivity.

filing criminal complaints and to seek whatever other relief was available. She briefly related her story to Patrolman William Schwartz who prepared a preliminary report and referred the matter to Detective Grabowski. Detective Grabowski interviewed Ms. Evans for approximately twenty minutes and then contacted the assistant prosecutor from whom authorization to file a criminal complaint was required. The assistant prosecutor came to Roselle police headquarters to discuss the matter with Detective Grabowski and, before leaving, recommended that charges of kidnapping and sexual assault be filed against McKenzie. Detective Grabowski then elicited a formal statement from Ms. Evans in which she graphically detailed the repeated acts of brutality McKenzie had inflicted upon her for three days.

Detective Grabowski concluded that, based on her domestic relationship with McKenzie, Ms. Evans was not the victim of a kidnapping or sexual assault. Detective Grabowski, knowing of the assault and kidnapping of Jan Parker, still would not permit Ms. Evans to file any criminal complaints or to seek other civil relief against McKenzie.

Despite his familiarity with the Prevention of Domestic Violence Act – an act whose purpose was to ensure domestic violence victims equal protection of the law – Detective Grabowski never complied with its mandates or advised Ms. Evans of her right to immediate judicial relief.[2] Detective Grabowski called the assistant

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[2] Under the New Jersey Prevention of Domestic Violence Act, a law enforcement officer must inform any victim of

(Continued on following page)

prosecutor assigned to the case and misrepresented to him the details of the statement given by Ms. Evans. As a result, the assistant prosecutor rescinded his earlier authorization to file criminal complaints. Though Grabowski had access to the telephone number of the court clerk and municipal court judge from whom Ms. Evans could have obtained the relief guaranteed to her by the Prevention of Domestic Violence Act, no action was taken. Detective Grabowski sent Debbie Evans home with instructions to return Monday if she wished to file a disorderly persons complaint. Ms. Evans spent that weekend at her mother's home, in shock over the callous disregard exhibited by the Roselle Police and in fear of McKenzie. In the meantime, no efforts were made to arrest McKenzie.

That Monday, January 14, 1985, on her way to the Roselle Police Department, Ms. Evans was reabducted by McKenzie. The next day, McKenzie stuffed her into the trunk of her car where she froze to death in the winter cold. Nearly one month later, her frozen body was discovered still in the trunk of her car.[3]

(Continued from previous page)

domestic violence of the right to go to court to file a criminal complaint and the right to seek a restraining order against the attacker. N.J. Stat. Ann. § 2C:25-7 (West 1982). In addition, a law enforcement officer who responds to the scene of domestic violence is required to prepare a detailed report of the incident and file the report with the state police. *Id.* § 2C:25-8.

[3] Clifton McKenzie was convicted on May 16, 1988 of the murder and kidnapping of Debbie Evans, for which he is serving a sentence of life imprisonment with a parole ineligibility period of thirty years.

This incident constituted one of the factors that prompted an investigation of the Roselle Police Department's Detective Bureau by the Union County Prosecutor's Office. The Prosecutor's investigation produced evidence of a long-standing failure to investigate reports of domestic violence. In fact, the Roselle Police Detective Bureau, of which Detective Grabowski was a member, failed to file a single domestic violence report from 1980 to September 1985. Grabowski himself admitted that he had never filed a domestic violence report and could not recall ever informing specific victims of domestic violence of their rights under the Prevention of Domestic Violence Act.

Proceedings In The Case

On December 11, 1986, petitioner Regina Brown, administratrix and administratrix ad prosequendum of the estate of Debbie Evans, filed a complaint with the United States District Court for the District of New Jersey pursuant to 42 U.S.C. §§ 1983 and 1988 seeking damages. In her complaint, petitioner alleged that respondents violated Debbie Evans' constitutional right of access to the courts as protected by the privileges and immunities clause of Article IV of the Constitution and the fourteenth amendment; that respondents deprived Debbie Evans of her due process right to life and liberty by failing to comply with the affirmative duty to protect her from a danger they had created themselves; and that respondents' discriminatory treatment of Debbie Evans as a woman and as a victim of domestic violence violated her constitutional guarantee to equal protection of the law. The complaint also alleged that the supervisory officials

and the Borough of Roselle had in place a policy, custom or practice of providing inadequate protection and unequal treatment to domestic violence victims and that they failed to properly train, supervise and discipline the Roselle police officers who violated Ms. Evans' constitutional rights. Petitioner further invoked the pendent jurisdiction of the court to hear and decide claims arising under New Jersey law. Respondents filed a motion to dismiss which the district court denied on all counts with respect to Grabowski and Schwartz. As to Chief Trolan, the Roselle Police Department and the Borough of Roselle, the district court dismissed without prejudice the claims against them and allowed petitioner to file an amended complaint. The district court denied respondents' motion for reconsideration.

On October 20, 1987, petitioner filed an amended complaint and basically reasserted her earlier claims. A final pretrial stipulation and order pursuant to Fed. R. Civ. P. 16 was prepared and submitted on March 1, 1989.

In March of 1989, the district court granted respondents' motion for summary judgment on petitioner's claim alleging that the Roselle Police had a duty to protect Ms. Evans pursuant to the due process clause of the fourteenth amendment,[4] and denied respondents' motion for summary judgment on all other claims. Respondents appealed this ruling to the court of appeals, and petitioner filed a cross-appeal solely challenging dismissal of the due process claim. A panel of the Third Circuit heard

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[4] The district court dismissed petitioner's due process claim as a result of the intervening decision of *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

oral argument on January 16, 1990, and issued its opinion on December 31, 1990. App. 1-57. In its decision, the court below reversed the district court's denial of qualified immunity on the right of access claim and the equal protection claim. The Third Circuit dismissed for lack of jurisdiction all appeals from the district court's rulings on the remaining issues. Both parties filed petitions for rehearing and rehearing in banc which were summarily denied on January 29, 1991. App. at 59.

REASONS FOR GRANTING THE WRIT

Debbie Evans' right to equal protection of the law as a female victim of domestic violence, and as a victim of domestic violence in general, was clearly established in 1985. The determination by the court of appeals to the contrary conflicts with this Court's precedents on equal protection jurisprudence and the doctrine of qualified immunity.

The Third Circuit's dismissal of petitioner's claim alleging violation of Debbie Evans' constitutional right of access to the courts by the Roselle Police conflicts with the decisional law of this Court.

POINT I

THE RIGHT OF FEMALE DOMESTIC VIOLENCE VICTIMS TO EQUAL PROTECTION OF THE LAW WAS CLEARLY ESTABLISHED IN 1985

The equal protection clause of the fourteenth amendment commands that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the

laws." U.S. Const. amend. XIV, § 1. Detective Grabowski and Patrolman Schwartz denied equal protection of the law to Debbie Evans by virtue of her status as a woman and as a victim of domestic violence in violation of the fourteenth amendment.

In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court ruled that a public official can only claim the protection of qualified immunity if the right the official is alleged to have violated was not clearly established.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the *very action in question has previously been held unlawful*, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 640 (citations omitted) (emphasis added).

In determining whether Detective Grabowski and Patrolman Schwartz are entitled to qualified immunity, a court must survey the legal landscape as it existed in January 1985 to ascertain whether it was clearly established at that time that their conduct violated Debbie Evans' constitutional rights. *See Anderson v. Creighton*, 483 U.S. 635 (1987). General legal principles governing analogous factual situations, if any, must be assessed to determine whether respondents should have related the established law to the instant situation. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 726 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 840 (1990). Strict factual identity between applicable precedent and the case at issue is not required according to law in the Third Circuit. *Id.*

The court of appeals denied relief to petitioner by ruling that the right to equal protection of a woman subjected to domestic violence was not clearly established in 1985. The court granted qualified immunity to respondents based on the argument that only one case addressing equal protection rights of female domestic violence victims preceded the underlying events of this case[5] and because most of the scholarship in this area postdated these events. App. at 48-49.

The court of appeals concluded that the right of female domestic violence victims to equal protection of the law was first clearly established in the Third Circuit in its self-proclaimed novel decision in *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988).[6] The standard in *Hynson* to assert an equal protection claim, however, essentially is identical to the decisional law of

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[5] *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). *Thurman* was the first reported decision in which a court held that police conduct treating victims of domestic violence differently from other assault victims constituted gender-based discrimination violative of the equal protection clause. In that case, the plaintiff sought protection of the police from her husband after being victimized and subjected to violence for several months without receiving any police assistance. The police failed to assist her until after the plaintiff's husband stabbed her and persisted in attacking her while police officers stood by watching. *Id.* at 1525-26.

[6] In *Hynson*, the plaintiffs alleged that the defendant police officers pursued a policy of ignoring domestic abuse complaints and thereby violated the plaintiffs' decedent's right to equal protection of the law by failing to arrest the former boyfriend of the decedent, who subsequently killed her. 864 F.2d at 1027.

the United States Supreme Court which preceded the events that led to the death of Debbie Evans.

Long before 1985, this Court recognized that a classification that is gender-neutral but which adversely affects women in far greater proportion than men, violates the equal protection clause of the fourteenth amendment to the United States Constitution if the disproportionate impact is the result of purposeful or intentional discrimination. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *see also Washington v. Davis*, 426 U.S. 229, 241 (1976). In this case, Detective Grabowski provided little or no protection at all to domestic violence victims as compared to general victims of violence. In the Borough of Roselle, the class of domestic violence victims was comprised almost exclusively of women. The failure to provide these essential police services was the result of purposeful discrimination against women. Archaic and overbroad generalizations about the role of women based on outdated misconceptions may not serve as the basis for such distinctions. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *see also Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). The Court articulated a two-part inquiry in *Feeney*:

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

442 U.S. at 274. Unlike *Feeney*, where the Court rejected the argument that a classification favoring veterans over nonveterans was simply a pretext for preferring men over

women,[7] the classification employed by Detective Grabowski almost exclusively disfavored women[8] and was the result of invidious discrimination.

An assault is no less criminal when it is perpetrated by one's spouse or cohabitant than when committed by an unknown assailant. Providing less protection to victims merely because the violence committed against them was in a domestic setting reflects invidious gender discrimination when the class of domestic violence victims is almost exclusively comprised of women. New Jersey law makes no distinction between domestic and nondomestic violence. However, Detective Grabowski revealed his true motives at deposition stating that Ms. Evans' prior sexual relationship with McKenzie undermined the credibility of her accusations. Thus, there was little doubt Detective Grabowski acted according to his stereotypical view of women.

Both the Third Circuit's decision in *Hynson* and this Court's decision in *Feeney* address the level of proof required to challenge a facially-neutral policy that disproportionately affects women. Comparing the *Feeney* methodology with that employed in *Hynson*, it becomes apparent that the same rationale was considered. *Hynson*

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[7] 442 U.S. at 275.

[8] Differential treatment by the police of domestic violence victims primarily harms women. Prior to 1985, as many as ninety-five percent of domestic disturbance complaints to police were filed by women. Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788, 799 n.49 (1986) (discussing statistical studies conducted prior to 1980). Public perception tells us that most, if not all, domestic violence has been inflicted by men against women. *Id.* at 799. Therefore, it is obvious that a policy of not arresting domestic abusers primarily harms women.

concluded that a plaintiff would prevail if she could prove the existence of a discriminatory policy, or a facially-neutral policy applied with discriminatory intent, provided that the police officers did not possess a qualified immunity. 864 F.2d at 1032.

Hynson also discussed the circumstances that would warrant qualified immunity. According to *Hynson*, a police officer is not entitled to qualified immunity if he knows (1) that the policy has a discriminatory impact on women, (2) that bias against women was a motivating factor behind adoption of the policy, and (3) that no important public interest is served by the policy. *Id.*

None of these elements is unique to the Third Circuit's opinion in *Hynson*. The first factor cited above in *Hynson*, discriminatory impact, was an intrinsic aspect of the challenge in *Feeney*. *See* 442 U.S. at 273-74 (principles of *Washington v. Davis* and *Arlington Heights v. Metropolitan Hous. Dev. Corp.* regarding disparate impact apply with equal force to gender discrimination case). The second facet, bias against women as a motivating factor, parallels part two of the *Feeney* inquiry, which looks at whether the adverse effect results from an intent to discriminate against women. *Id.* at 274. The final element, that a classification based on gender must serve an important government interest, is also well established because such classifications are considered "quasi-suspect" and must be subjected to heightened, or intermediate, scrutiny. To survive this form of heightened scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S.

190, 197 (1976); *accord Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Based upon the above, it is apparent that *Hynson* is no different from this Court's opinion in *Feeney* which first inquires whether the classification is neutral in the sense that it is not gender-based and, second, if not gender-based, whether the classification stems from invidious gender-based discrimination. 442 U.S. at 274. The Third Circuit's pronouncement that *Hynson* enunciated a so-called "new equal protection rule"[9] overlooks decades of law from this Court. *See Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979); *see also Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (recognizing that when a neutral law has a disparate impact on a group that has historically suffered discrimination, an unconstitutional purpose may be at work); *cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding facially-neutral ordinance invalid due to effect of excluding one particular ethnic group). By claiming that *Hynson* formulated a new standard, the Third Circuit has said in essence that female domestic violence victims were not entitled to equal protection of the law until 1988. Surely, this analysis is wrong.

The general contours of the right to equal protection for victims of domestic violence were well known before 1985. Since 1982, the Prevention of Domestic Violence Act had attempted to rectify what had been known for years – that victims of domestic violence were not receiving the same protection of the law afforded to victims of other

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[9] App. at 47.

crimes. The legislative findings set forth in the introductory passage of the statute state the following:

> [P]revious societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context.

N.J. Stat. Ann. § 2C:25-2 (West 1982). The legislature acknowledged that battered adults had experienced "substantial difficulty in gaining access to protection from the judicial system." *Id.* In spreading the message that domestic violence will not be excused or tolerated, the New Jersey Legislature unequivocally announced to law enforcement officers that "the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation." *Id.*

The constitutional right to equal protection for female victims of domestic violence, however, preceded this legislation. The 1982 New Jersey Prevention of Domestic Violence Act was intended to enforce the rights of domestic violence victims to equal protection of the law.

Accordingly, it is beyond dispute that the law was clearly established in 1985, that Debbie Evans, as a female victim of domestic violence, was entitled to equal protection of the law and that the conduct of the police officers violated this clearly established right.

POINT II

THE ROSELLE POLICE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY TREATING DOMESTIC VIOLENCE VICTIMS DIFFERENTLY FROM OTHER VICTIMS OF VIOLENT CRIMES WITHOUT ANY RATIONAL BASIS FOR SUCH A DISTINCTION

The Third Circuit limited its analysis solely to the context of gender-based discrimination. It failed to further analyze whether respondents violated clearly established equal protection rights by treating domestic violence *victims* – not just victims of domestic violence who are women – differently from victims of nondomestic violence without having any rational basis for this distinction. *See, e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-47 (1985) (after determining that the mentally retarded would not be treated as quasi-suspect class, Court subsequently analyzed whether discriminatory treatment satisfied rational basis standard).

A classification established through state action that treats differently those similarly situated must bear some rational relationship to a legitimate state interest. The concept that similarly situated persons may not be subject to arbitrary and irrational classifications by the state is not novel. *E.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (mentally retarded may not be subjected to requirements directed solely at that particular group when interests advanced by state rest on irrational prejudice); *Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute lacked rational basis by withholding funds from local school districts for education of children not legally admitted into United States and authorizing districts to deny enrollment to such children); *Royster Guano Co. v.*

Virginia, 253 U.S. 412, 415 (1920) ("the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"). Thus, it is beyond question that in 1985 the equal protection clause mandated domestic violence victims be treated no differently from victims of other assaults unless there was some rational basis for distinguishing between these two groups pursuant to a legitimate governmental objective. The respondents have never advanced any basis, rational or otherwise, to justify the denial of the equal protection of the law to domestic violence victims.

Simply because a case in the Third Circuit had not yet ruled that "the very action in question has previously been held unlawful" does not mean that the law was not clearly established. *See Anderson v. Creighton*, 483 U.S. at 640. For instance, Detective Grabowski could not take refuge in qualified immunity if he had treated red-haired crime victims differently from crime victims without red hair, despite the fact that the Third Circuit has never ruled on the issue of disparate treatment for red-haired individuals. On the contrary, any reasonable police officer in 1985 should have known that arbitrary and irrational discrimination against victims of domestic violence, based either on their status as such or on their status as women, was unlawful and unrelated to any legitimate government objective.

In overlooking the fundamental legal principle that the police may not treat similarly situated individuals

differently where there is no rational basis for discriminatory treatment, the court below failed to consider governing decisions of this Court.

POINT III

THE ROSELLE POLICE VIOLATED THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF DEBBIE EVANS BY DENYING HER ACCESS TO THE COURTS

Petitioner claims that respondents deprived Debbie Evans of her constitutional right of access to the courts. The district court agreed and ruled "the decedent had a constitutionally protected right under those cases establishing a right of access to the civil courts." App. at 69. The district court also found that this right was clearly established due to the enactment in 1982 of the New Jersey Prevention of Domestic Violence Act, the awareness by respondents of Debbie Evans' plight, and the decision in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), which found a violation of constitutional magnitude in a similar domestic violence situation. App. at 71-72. The court of appeals reversed, ruling that petitioner's right of access claim was not constitutionally cognizable. App. at 43.

A. Active Interference By The Roselle Police With Debbie Evans' Right Of Access To The Courts Gives Rise To A Constitutionally Cognizable Claim

The right of access to the courts is basic to our system of government and is well established. *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983). This right is derived

from the privileges and immunities clause of article IV of the Constitution and the fourteenth amendment, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907), the first amendment, *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), and the due process clause of the fourteenth amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

Access to the courts is one of the fundamental rights protected by the Constitution. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Ryland v. Shapiro*, 708 F.2d at 971. The access provided must be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. at 822; *Ryland v. Shapiro*, 708 F.2d at 972. Interference with the right of access to the courts gives rise to a claim for relief under 42 U.S.C. § 1983. *Ryland v. Shapiro*, 708 F.2d at 972.

> In conclusion, it is clear that, under our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions.

Id. The above cases encompass petitioner's claim that Debbie Evans was deprived of her constitutionally protected right of access to the civil courts.

According to the Third Circuit's interpretation, however, the due process clause of the fourteenth amendment requires that state actors refrain only from preventing individuals from obtaining access to the civil courts and that they are not obligated to provide assistance in gaining access unless an individual is in the custody of the state. App. at 35-36. Respondents' actions amounted to

more than the mere failure to provide assistance in gaining access; rather, they actively impeded Debbie Evans' right of access to the courts. Ms. Evans conveyed her desire to file a complaint and to obtain any relief the law afforded her. Certainly, she did not have to recite to Detective Grabowski chapter, line and verse her entitlement under the Prevention of Domestic Violence Act to file a criminal complaint or seek a restraining order. The Act was meant to spare battered victims these formalisms and presumes that many, if not most, battered victims would not know all the relief the law provides under the circumstances. The express purpose of the Prevention of Domestic Violence Act was to "assure the victims of domestic violence the maximum protection from abuse the law can provide." N.J. Stat. Ann. § 2C:25-2 (West 1982). The Act explicitly mandates that police officers handling a domestic violence situation must advise the victim of her right to obtain a restraining order. *Id.* § 2C:25-7.

Petitioner does not contend that respondents' failure to comply with the dictates of the Prevention of Domestic Violence Act, by itself, states a claim under § 1983 which requires a violation of federal statutory law or constitutional rights. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). The Act merely spells out one way the right of access may be protected from interference. To focus solely on the Act as the source of Debbie Evans' constitutional rights ignores the actual constitutional basis behind her claim.

> Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a

> functionary who, by refusal or neglect, impedes the filing of his papers?

McCray v. Maryland, 456 F.2d 1, 6 (4th Cir. 1972). The question here is not, as the court of appeals opined, whether Debbie Evans was constitutionally entitled to certain social services, as in *Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989),[10] but whether state officials arbitrarily denied her the right to obtain access to our judicial system, a right derived directly from the Constitution.

The assistant prosecutor initially had recommended the filing of criminal complaints for kidnapping and sexual assault. Had these complaints been filed, McKenzie could have been arrested. However, Detective Grabowski inexplicably misrepresented the facts of Ms. Evans' statement to the assistant prosecutor, leaving him with the belief that there was no basis to charge McKenzie. Based on Detective Grabowski's misrepresentations, the assistant prosecutor subsequently rescinded his authorization for the filing of criminal charges against McKenzie. The assistant prosecutor has acknowledged that, had the entire statement of Ms. Evans been read to him, he would have authorized the issuance of criminal complaints. Detective Grabowski's misrepresentation of material information to the assistant prosecutor denied Ms. Evans access to the criminal courts and thereby imposed upon him a corresponding duty to inform her of the right to obtain a restraining order pursuant to the Prevention of Domestic Violence Act. Detective Grabowski's interference with Ms. Evans' constitutional rights prevented

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[10] App. at 38-39.

her from obtaining the judicial assistance necessary to protect her life.

Although the court below relied on *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), to deny petitioner's right of access claim, the circumstances and the right asserted in the case before the Court are distinct from that decision. In *DeShaney*, the Supreme Court held that the state's failure to protect an infant against private violence did not constitute a deprivation of liberty in violation of the due process clause. By contrast, petitioner here asserts that Detective Grabowski actively interfered with Ms. Evans' right of access to the courts. Detective Grabowski was not a passive spectator who watched from a distance as the tragedy unfolded.

Even under the framework employed by the lower court, petitioner's claim remains viable notwithstanding *DeShaney*. Respondents, particularly Detective Grabowski, played an active role in restraining Debbie Evans' liberty by denying her access to the judicial system. This restraint on her personal liberty created the danger which led to her death.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf – through incarceration, institutionalization, or other similar *restraint of personal liberty* – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause. . . .

489 U.S. at 200 (emphasis added). The Court in *DeShaney* also remarked that state officials will be liable if their actions create the danger which causes a victim's injuries

or their actions render a victim more vulnerable to harm. *Id.* at 201.

Since *DeShaney*, several circuits have sustained claims brought pursuant to § 1983 where the victim was neither in state custody nor institutionalized. These cases have focused instead on whether state action had placed the victim in "special danger" or whether the state had a "special relationship" with the victim which imposed upon state officials an affirmative duty to provide assistance. *E.g.*, *Gregory v. City of Rogers*, 921 F.2d 750, 754 (8th Cir. 1990) (removing designated sober driver from vehicle created dangerous situation that intoxicated passenger would drive vehicle and cause harm);[11] *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (plaintiff, as opposed to general public, shared "special relationship" with defendant town officials not only by defendants' creation of dangerous condition through establishment of inmate work squad, but also by increasing plaintiff's vulnerability to harm through exposure to violent convicts),[12] *cert. denied*, 110 S. Ct. 1784 (1990); *Wood v.*

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[11] In *Gregory*, a police officer pulled over a vehicle containing three people. The driver, the only sober one, had been deemed the group's "designated driver," but there was an outstanding warrant for his arrest. The officer instructed the driver to follow him to the police station, and while the driver was detained, one of the intoxicated passengers took over behind the wheel and drove away, killing himself and seriously injuring the other passenger. 921 F.2d at 751-52.

[12] In *Cornelius*, another post-*DeShaney* case, inmates from a prison work squad deployed around the town hall abducted and terrorized the municipal clerk, who subsequently brought an action under § 1983 alleging deprivation of her constitutionally protected liberty interests. 880 F.2d at 349.

Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989) (summary judgment denied to defendant for actively participating in creating risk of danger to victim),[13] *cert. denied*, 111 S. Ct. 341 (1990).

DeShaney left unclear "how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect." *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990). *Freeman* supports the claim that the violence to which Debbie Evans was subjected was not solely the result of private action, "but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community – with such interference increasing the vulnerability" of Ms. Evans to the actions of Clifton McKenzie. *Id.* at 54.

These cases stand for the proposition that when state officials create a special danger and make a victim more vulnerable to harm from outside forces, these officials will be liable under § 1983, even after *DeShaney*. The Supreme Court in *DeShaney* acknowledged the distinction between mere inaction and the circumstances of the present case which required that action be taken, just as described in the above cases.

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[13] In *Wood*, the defendant, a state trooper, pulled over a vehicle and arrested the operator for drunk driving. The plaintiff passenger was stranded alone on the roadway at 2:30 a.m. and, after refusing offers of rides from several strangers, she accepted a ride from an unknown man who took her to a secluded place and raped her. 879 F.2d at 586.

In the instant case, Detective Grabowski played an essential part in creating the very danger which led to Ms. Evans' death. Detective Grabowski knew of Ms. Evans' three-day ordeal, of McKenzie's criminal record, of McKenzie's unauthorized absence from an in-patient drug rehabilitation center, and of the earlier kidnapping and assault of Jan Parker, and yet he then misrepresented to the assistant prosecutor the details of the crime committed against Ms. Evans. In so doing, Detective Grabowski created or increased the danger to Ms. Evans and denied her access to the courts.

B. The Law Was Clearly Established In 1985 That Roselle Police Officers Could Not Deprive Debbie Evans Of Her Constitutional Right Of Access To The Courts And, Accordingly, They Are Not Entitled To Qualified Immunity

As of January 1985, the right of access to the courts was a clearly established constitutional principle. *E.g., Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983). The district court determined that an objectively reasonable police officer would have known of the rights asserted by petitioner, and thus be barred from asserting qualified immunity, because of the passage of the Prevention of Domestic Violence Act in 1982, familiarity with Ms. Evans' situation and general publicity about the plight of victims of domestic abuse. App. at 71-72.

Respondents knew, or should have known as of January 1985, of the proper procedures in responding to a

victim of domestic violence. They should have been familiar with the constitutionally based right of access to the judicial system and the Prevention of Domestic Violence Act, enacted in 1982. Yet, due to their intentional disregard of well-established principles, Debbie Evans was brutally murdered. Since the contours of the law at the time of this incident were sufficiently clear, respondents should have understood that their actions violated Ms. Evans' rights. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Hence, the individual police officers are not entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

* Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
* Counsel of Record

Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Petitioner

April 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and
Administratrix Ad Prosequendum of the
Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William Schwartz, Vincent F. Trolan, and the Borough of Roselle, *Appellants in 89-5487*

Regina Brown, *Appellant in 89-5532*

On Appeal From the United States District Court
for the District of New Jersey
(D.C. Civil No. 86-4895)

Argued: January 16, 1990

Before: BECKER, GREENBERG and NYGAARD, *Circuit Judges*

(Filed December 31, 1990)

BARRY T. ALBIN (Argued)
JAMES E. TRABILSY
RICHARD P. JACOBSON

Wilentz, Goldman & Spitzer
90 Woodbridge Center Drive
Woodbridge, NJ 07095

Attorneys for Appellant
in 89-5532

LINDSEY H. TAYLOR (Argued)
Kalb, Friedman, Siegelbaum & Moran
7 Becker Farm Road
Roseland, NJ 07068

IRVING F. STURM
Municipal Attorney
Borough of Roselle
210 Chestnut Street
Roselle, NJ 07203

Attorneys for Appellants
in 89-5487

OPINION OF THE COURT

BECKER, *Circuit Judge.*

Deborah Evans was found frozen to death in the trunk of her car in February of 1985 in a motel parking lot in Iselin, New Jersey. Clifton McKenzie, Evans' former live-in boyfriend, had abducted her and imprisoned her there. In a separate episode, which occurred shortly before this fatal abduction, McKenzie had held Evans hostage for a period of three days, during which he repeatedly threatened and sexually assaulted her. During the weekend following this preliminary reign of terror, members of Evans' family and Evans herself related these events to Patrolman William Schwartz and Detective

Felix Grabowski of the Police Department of Roselle Borough, where Evans lived and where most of the events took place. Despite the entreaties of Evans and her family, however, no criminal charges against McKenzie were filed.

These cross-appeals are from the district court's summary judgment rulings in a civil rights case that Evans' personal representative brought against the Borough and employees of its police department. This action is based upon allegations that, but for the sloth and callousness of the department in general and of Detective Grabowski in particular, Evans' death would not have occurred. Plaintiff asserts that the defendants, discriminatorily and through willful neglect, denied Evans her constitutional rights to due process and of access to the civil and criminal courts. Plaintiff further alleges that the Roselle Police Department had a long-standing policy of inaction in domestic violence cases, motivated by discrimination against women, leading to a violation of Evans' equal protection rights.

Because of the absence of finality, we lack appellate jurisdiction over several of the district court's orders granting or denying summary judgment with respect to plaintiff's federal claims. Deciding a question of first impression in this circuit, and influenced by New Jersey's inhospitability to interlocutory appeals, we conclude that the doctrine of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), does not provide us with jurisdiction to entertain the appeals by the defendant police officers from the denial of their motions for summary judgment, on grounds of qualified immunity, with respect to plaintiff's *state* law

claims. Under *Mitchell*, however, we plainly have appellate jurisdiction over the appeals of Detective Grabowski, Officer Schwartz, and Roselle Police Chief Vincent Trolan (in his individual capacity) from the district court's denials of their motions for summary judgment invoking qualified immunity as a defense to several of plaintiff's *federal* claims.

Our qualified immunity inquiry presents a novel question concerning the scope of review of the district court's decisions denying defendants' claims of qualified immunity. We conclude that, in determining whether the district court properly denied defendants' claims of immunity, we may consider not only whether the rights that defendants are claimed to have violated were clearly established at the time of their contact with Evans, but also whether they were established at all. In addition, we construe *Anderson v. Creighton*, 483 U.S. 635 (1987), and our own precedents to require that we engage in an analysis of the facts adduced concerning defendants' conduct – and not only the pleadings – in determining whether they are entitled to qualified official immunity.

On the merits, plaintiff's claim of denial of access to the civil courts presents us with some difficulty. In framing this cause of action, plaintiff relies on a New Jersey statute that expands avenues of recourse for victims of domestic violence, requiring that police inform these victims of their right to obtain a restraining order against an attacker in the civil courts. In light of this statute and the egregious inaction of Detective Grabowski, plaintiff presents an appealing case for relief. Ultimately, however, plaintiff's theory that defendants violated Evans' right of access to the civil courts by failing to provide her with the

assistance required by New Jersey law is not constitutionally cognizable. The constitutional right of access to the civil courts simply is not expansive enough to encompass the state statutory rights that defendants are claimed to have violated. Plaintiff's theory also runs afoul of the Supreme Court's holding in *DeShaney v. Winnebago County Department of Social Service*, 109 S. Ct. 998 (1989), that a state's failure to take affirmative action to protect a victim from the actions of a third person will not, in the absence of a custodial relationship between the state and the victim, support a civil rights claim. *DeShaney* compels the additional conclusion that plaintiff's civil court access claim does not present a genuine issue of material fact. Consequently, from both a legal and a factual perspective, a reasonable police officer could not have known that by failing to facilitate Evans' access to the civil courts, he was in any way violating her constitutional rights. Accordingly, we must reverse the district court's denial of defendants' motion for summary judgment on plaintiff's civil court access claim.

The propriety of the district court's refusal to grant summary judgment for defendants on plaintiff's equal protection claim turns on the degree to which the principles set forth in *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988), were clearly established at the time of the events in question. *Hynson* holds that the equal protection clause is implicated when (1) the policy or custom of the police is to provide less protection to victims of domestic violence than to other victims of violence; (2) discrimination against women is a motivating factor; and (3) the plaintiff has been injured by this custom. Although plaintiff might survive defendants' motion for summary

judgment had the events in question occurred after *Hynson*, we read that case as announcing a new principle of law in this Circuit. We conclude that the right to equal protection that plaintiff asserts was not clearly established in 1985. Because a reasonable police officer would not have known that he was violating Evans' right to equal protection, Grabowski's and Schwartz's motions for summary judgment based on qualified immunity should have been granted. Further, because there is no evidence of his personal involvement in the actions or matters in question, we must also reverse the district court's denial of summary judgment for Chief Trolan, sued in his individual capacity.

I. FACTS AND PROCEDURAL HISTORY

The facts of this case, which are essentially uncontested, chronicle with numbing detail the disturbing inaction on the part of Roselle's Police Department that led to this tragedy.

Deborah Evans' ordeal began early in January of 1985, when Clifton McKenzie, without permission, left the drug rehabilitation center into which he had been paroled following a conviction on forgery and drug charges. According to McKenzie, he began using heroin and related drugs within four days of leaving his treatment program. Immediately after leaving the center, McKenzie, who previously had lived with Evans, took up residence in her apartment. Evans objected to McKenzie's presence there and told him that she wanted nothing else to do with him, unless he returned to his rehabilitation program.

Several days after McKenzie took up residence with her, Evans left her apartment and asked a friend, Jan Parker, to retrieve her apartment keys from McKenzie. When Parker arrived at Evans' apartment, McKenzie beat her until she lost consciousness. McKenzie then abducted Parker and drove her to New York City in her car. Once in New York, Parker managed to escape, contacted the New York City Housing Authority Police, and was taken to a hospital.

The Housing Authority Police immediately reported the incident to the Roselle Police Department, where the investigation of the assault and kidnapping of Jan Parker fell to Detective Felix Grabowski, now a defendant in this case. Based on his conversations with a Housing Authority patrolman, the doctor who treated Parker, and Parker herself, Grabowski determined that there was probable cause to believe that McKenzie had committed aggravated assault, kidnapping, and car theft. Grabowski did not seek to obtain a warrant for McKenzie's arrest, however, and merely advised Parker to come to Roselle Police Headquarters upon her release from the hospital to give a formal statement that would support the issuance of a criminal complaint.

On the same day that he assaulted and abducted Jan Parker, McKenzie returned to Roselle for Deborah Evans, who would receive even less help than did Parker from the local police. McKenzie asked Evans to drive him back to the drug rehabilitation center, but instead abducted her. After forcing Evans to let him drive, McKenzie made her get out of the vehicle in the middle of the Pulaski Skyway, assaulted her, and then threatened to throw her from the top of the Skyway bridge. That night, McKenzie

drove Evans back to her apartment. Except for taking Evans on an excursion to withdraw money from her bank account for a drug purchase, McKenzie held her there against her will for the next three days, constantly monitoring her actions and refusing even to permit her to answer her telephone. During this time, McKenzie sexually assaulted Evans twice. In addition to slapping Evans a number of times, McKenzie also threatened her with a butcher knife, indicated that he soon would kill her, forced his fingers into her mouth, and, placing his hands over her mouth, pinned her to her couch. Evans' three-day ordeal came to an end only when, against McKenzie's instructions, she opened her apartment door to her brother and sister and McKenzie fled through the bathroom window of her apartment, taking her purse with him.

Evans' brother and sister, who had contacted the Roselle Police Department a total of five times during the three days of Evans' disappearance, accompanied her to the Roselle Police Station. There, Evans briefly recounted her story to defendant Patrolman William Schwartz. Schwartz made a preliminary report and referred the matter to Grabowski, who, with a second detective, interviewed Evans. The two detectives then met with the Borough's assistant prosecutor, William Daniel, who instructed Grabowski to elicit a formal statement from Evans to support the filing of a criminal complaint against McKenzie.[1]

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[1] Under New Jersey law at the time, police were required to obtain the approval of a county prosecutor prior to filing a

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In the course of providing her formal statement, Evans, in addition to relating what had befallen her during the previous three days, informed Grabowski that she had, in the past, lived intimately with McKenzie. Grabowski concluded that this prior relationship between the two undermined Evans' assertion that McKenzie had kidnapped and sexually assaulted her. In response to questioning from the detectives in the immediate aftermath of her trauma, Evans also stated that she believed she could have escaped from McKenzie on several occasions, but that she had remained with him because she wanted her keys back. Although he believed that McKenzie had held Evans for three days, often at knife point, Grabowski evidently concluded that Evans' responses further undermined possible kidnapping and sexual assault charges against McKenzie. Because Evans reported that she had showered before arriving at the police station, Grabowski also concluded that it would be difficult to establish sexual assault charges.

Unable to reach Assistant Prosecutor Daniel for advice on whether to lodge kidnapping and sexual assault charges against McKenzie, Grabowski told Evans to return to the police station on the Monday two days hence to file charges, the nature of which he did not specify. There is conflicting testimony as to whether Grabowski ever intended to lodge these charges. It is clear, however, that he did not inform Evans of her rights under

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charge for an indictable offense. It was not necessary, however, for either the police or a victim to obtain such approval prior to filing a nonindictable disorderly persons complaint.

New Jersey's Prevention of Domestic Violence Act, in particular, her right, as a victim of domestic violence, to obtain a restraining order against McKenzie from the Juvenile and Domestic Relations court, even on a weekend.[2]

After Evans had left the police station, Grabowski succeeded in reaching Assistant Prosecutor Daniel. Grabowski told Daniel that kidnapping and sexual assault charges against McKenzie would be difficult to prove. Grabowski did not, however, actually read Evans' statement to Daniel. Based upon Grabowski's characterization of the case, Daniel agreed that there was no probable cause to charge McKenzie. Daniel later concluded that, had Grabowski read Evans' entire statement to him, he

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[2] The Domestic Violence Act provides:

> A law enforcement officer shall disseminate to the victim the following notice, which shall be written in both English and Spanish:
>
> "You have the right to go to the Juvenile and Domestic Relations Court and file a complaint requesting relief including, but not limited to the following: an order restraining your attacker from abusing you or directing your attacker to leave your household. You may request that the clerk of the court assist you in applying for this order. You also have the right to go to court and file a criminal complaint.
>
> "On weekends, holidays, and other times when the courts are closed, you may go to the municipal court for an emergency order granting the relief set forth above."

N.J. Stat. Ann. § 2C:25-7 (1982) (Add. 5)

would have authorized the filing of the kidnapping and sexual assault charges.

Grabowski testified that the Roselle police made an effort to find McKenzie during the weekend, but conceded that they made no attempts to arrest him. Although Grabowski further testified that protection would have been forthcoming had Evans requested it, he also testified that no patrol units were assigned to protect her.

On the Monday following the weekend, Evans left her mother's house, where she had stayed for the weekend, to renew her efforts to file a complaint against McKenzie. She did not reach the police station, however, and was never again seen alive. McKenzie once more abducted Evans and ultimately placed her, unconscious, in the trunk of her car, where she froze to death. Evans' body was discovered nearly a month later, still in the trunk of her car, which was parked outside of a motel where McKenzie had overdosed on drugs. McKenzie, whose testimony revealed remorse and suggested that he may have experienced drug-induced rages and "blackout" periods during the time he terrorized Evans and Parker, subsequently was convicted of kidnapping and first degree murder.

This incident constituted one of the factors that prompted an investigation of the Roselle Police Department's Detective Bureau by the Union County Prosecutor's Office. Vincent Trolan, the Roselle Police Chief, resigned within a year of the mishandling of Evans' case. The prosecutor's investigation report stated that the

Roselle Police Department's Detective Bureau was "completely unsupervised." In response to this investigation, Chief Trolan had prepared reports detailing the activities of the Department's detective division. The Prosecutor's Office concluded that it was "obvious that the accomplishments cited . . . for each month varied greatly from the amount of work actually performed by the bureau." Filed reports, moreover, were available for only 31 of the 747 cases assigned to the Roselle Detective Bureau as a whole. The Prosecutor's investigation also produced evidence of a long-standing failure to follow up on reports of domestic violence. Indeed, the Department had no records whatsoever of crimes involving domestic violence. Grabowski later stated that he never had filed a domestic violence report and could not recall informing specific victims of domestic violence of their rights under the Domestic Violence Act.

Following Evans' death, her sister and personal representative, Regina Brown, brought this five-count civil rights action. The first four counts, bottomed on 42 U.S.C. § 1983, allege that defendants, including Detective Grabowski, Patrolman Schwartz, Chief Trolan (in both individual and official capacities), the Roselle Police Department, and the Borough of Roselle, violated Evans' constitutional rights. The first count alleges that Grabowski and Schwartz, through failing either to file criminal charges against McKenzie or to assist Evans in obtaining the restraining order available to her under the New Jersey Domestic Violence Act, unlawfully interfered with and denied Evans her constitutional right of access to the judicial system. The second count alleges that Grabowski and Schwartz, by breaching an affirmative

duty of protection that arose from a special relationship with Evans, violated her constitutional right to due process. The third count alleges that Grabowski and Schwartz afforded Evans inadequate protection because she was a victim of domestic violence and thereby violated her constitutional right to equal protection. The fourth count, which names as defendants Chief Trolan, in both his individual and official capacities, the Roselle Police Department, and the Borough of Roselle, alleges that these defendants, through deliberate indifference to the consequences of failing to train and supervise their officers adequately, violated Evans' right of access to the judicial system, as well as her other due process and equal protection rights. The fifth count asserts pendent tort claims under New Jersey common law.

After a period of discovery, Grabowski and Schwartz moved for summary judgment on all five counts of plaintiff's complaint. The district court held that these defendants were entitled to summary judgment on count two of the complaint based upon *DeShaney*, 109 S. Ct. at 998. Under *DeShaney*, the state has a "special relationship" with an individual, creating a constitutionally enforceable duty of protection, only when it has deprived that individual of liberty and, thus, the freedom to act on his or her own behalf. The court concluded that no such special relationship existed with respect to Evans. Plaintiff appeals the grant of summary judgment for defendants on this claim.

The district court dealt with the court access claim in count one of the complaint in two separate proceedings. In an early proceeding on defendants' motions to dismiss various claims, the district court drew a distinction

between Evans' alleged constitutional right to bring criminal charges and her asserted constitutional right, arising from state legislation coupled with the right to due process, to receive assistance in bringing a civil action. The district court dismissed the component of count one alleging that Grabowski and Schwartz denied Evans' right of access to the criminal courts, emphasizing that, under *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), a private citizen clearly lacks a judicially cognizable interest in the criminal prosecution of another. The court held, however, that plaintiff stated a cognizable claim that Evans was denied her constitutional right of access to the *civil* courts and therefore did not dismiss count one in its entirety.

In the proceeding on the motions for summary judgment, the district court denied defendants' claim of qualified immunity with respect to the civil court access claim. The district court held that New Jersey's Prevention of Domestic Violence Act, in tandem with the due process clause of the fourteenth amendment, creates a constitutional right on the part of victims of domestic violence to receive police assistance in gaining civil court access and that Evans' situation clearly fell within the ambit of the Domestic Violence Act. The court further held that Grabowski's and Schwartz's knowledge of Evans' danger, in conjunction with general publicity about the plight of victims of domestic violence, was sufficient to put these defendants on notice that they had a constitutional duty to assist Evans in gaining access to the civil courts. The court concluded that this notice barred them from obtaining summary judgment on qualified immunity grounds.

The district court also held that plaintiff had adduced sufficient evidence of a pattern of deliberate indifference or a discriminatory policy or custom directed toward victims of domestic violence to survive defendants' motion for summary judgment on her equal protection claim. Additionally, the district court ruled against defendants on their motion for summary judgment raising the defense of qualified immunity to this claim, concluding that plaintiff's allegations of a pattern of discrimination on the part of Grabowski and Schwartz against victims of domestic violence could permit an inference of their intent to discriminate.

The court next considered whether summary judgment should be granted on plaintiff's claim that the Roselle Police Department, the Borough of Roselle, and Chief Trolan, in both his individual and official capacities, ultimately are liable for the deprivation of Evans' constitutional rights. The court concluded that because plaintiff had sufficiently substantiated her allegation that the misconduct of Schwartz and Grabowski was both causally connected to Evans' death and attributable to a municipal plan or policy evincing deliberate indifference to the constitutional rights of domestic violence victims, defendants were not entitled to summary judgment on this claim.

Finally, the district court held that summary judgment should not be granted for defendants on plaintiff's pendent state claim that Chief Trolan, the Roselle Police Department, and the Borough of Roselle caused Evans' death through a negligent and wanton disregard for her safety that amounted to a breach of their duty to protect her. The court concluded that defendants' investigative and protective duties to Evans were of a ministerial type

not shielded by New Jersey's Tort Claims Act. The court further concluded that, notwithstanding the Tort Claims Act's provisions shielding discretionary decisions concerning arrests and the provision of police protection, the Domestic Violence Act subjected defendants to potential liability for failure to perform the nondiscretionary functions of ensuring that Evans knew her rights as a victim of domestic violence and of providing her with any necessary assistance in securing court protection.

II. APPELLATE JURISDICTION

It is clear that we have jurisdiction over the interlocutory appeals of Grabowski, Schwartz, and Trolan, sued in his individual capacity, based upon the defense of qualified immunity that these defendants have asserted in response to plaintiff's civil court access, equal protection, and deliberate indifference claims. Under *Mitchell v. Forsyth*, 472 U.S. at 511, which holds that qualified immunity from federal claims encompasses not only immunity from liability, but also immunity from suit, a decision denying a claim of qualified immunity, and thereby vitiating the entitlement not to stand trial, is immediately appealable.

Equally clearly, we lack jurisdiction over the appeals by Chief Trolan, in his official capacity, the Roselle Police Department, and the Borough of Roselle from the district court's refusal to grant summary judgment on plaintiff's claim that these defendants denied Evans her constitutional rights through failing to train and supervise their police officers adequately. Denials of motions for summary judgment generally are not final orders. *United States v. Spears*, 859 F.2d 284, 286 (3d Cir. 1988); *see Cohen*

v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) (enunciating collateral order doctrine applicable to a "small class" of cases, but emphasizing that 28 U.S.C. § 1291 generally does not "permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge"). The Borough of Roselle is the real party in interest with respect to plaintiff's claims against Chief Trolan, in his official capacity, and the Roselle Police Department, and the Borough cannot assert a qualified immunity defense so as to qualify, under *Mitchell*, for review of the district court's summary judgment ruling. *See Owen v. City of Independence*, 445 U.S. 622 (1980) (under section 1983, a municipality has no immunity from liability for violations of constitutional rights).

It is clear, in addition, that we lack jurisdiction to review: (1) the district court's dismissal of the component of plaintiff's court access claim that alleges that Grabowski and Schwartz denied Evans' constitutional right of access to the criminal courts; and (2) the district court's grant of summary judgment for Grabowski and Schwartz on plaintiff's claim that the officers violated Evans' right to due process by breaching their duty to protect her. Other claims remain pending in the district court, and plaintiff did not obtain certification with respect to either claim under rule 54(b), even if she could have done so. *See* Fed. R. Civ. P. 54(b) (requiring an "express determination" that fewer than all claims in action may be appealed and an "express direction" for entry of judgment).[3]

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[3] The doctrine of pendent appellate jurisdiction also fails to supply the missing jurisdictional ground for reviewing the

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Whether we have jurisdiction to review the district court's denial of qualified immunity to defendants on plaintiff's pendent state tort claims is a much more difficult question. This overarching question actually devolves into two inquiries: (1) a predicate inquiry into whether the federal law of qualified official immunity ultimately governs appealability in this instance; and (2) a subsequent inquiry into the nature of the qualified immunity that New Jersey law confers upon state officials.

The Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717 (1988), necessitates our predicate inquiry. In *Budinich*, the Supreme Court held that the procedural rule of finality of 28 U.S.C. § 1291 – not rules of finality supplied by state law – should govern

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district court's decisions as to these claims. Under this doctrine, an appellate court may assert jurisdiction over a claim that neither is certified pursuant to Fed. R. Civ. P. 54(b) nor falls within the small class of claims covered by the collateral order doctrine only if the claim is inextricably intertwined with another claim over which the court properly has jurisdiction. *See Kershner v. Mazurkiewicz*, 670 F.2d 440, 449 (3d Cir. 1982) (holding pendent class certification order appealable under doctrine of pendent appellate jurisdiction only if "inextricably bound" to related issue appealable pursuant to 28 U.S.C. § 1292). Defendants' appeal asserting qualified immunity with respect to plaintiff's civil court access claim may be resolved without reference to the propriety of the district court's decision to dismiss plaintiff's related criminal court access claim. We also need not analyze the district court's decision to grant summary judgment for the defendants on plaintiff's due process claim in order to resolve the other appeals over which we have concluded we have jurisdiction.

appealability even in diversity cases. One implication of the Court's decision in *Budinich* is that our decision on the appealability of the district court's denial of defendants' motion for summary judgment should be governed solely by section 1291 as interpreted in *Mitchell*.

As we have noted, *Mitchell* holds that qualified official immunity with respect to federal statutory and constitutional claims constitutes an immunity from suit, as well as a defense to ultimate liability. In contrast to decisions that solely concern immunity as a defense to liability, decisions that concern immunity from suit fall within the small class of appealable decisions, carved out by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546, that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *See Mitchell*, 472 U.S. at 527-29. A decision denying summary judgment to an official asserting immunity from both litigation and liability in response to a federal claim, like a decision denying summary judgment on a double-jeopardy claim of right not to stand trial, *see Abney v. United States*, 431 U.S. 651 (1977), involves "a right [that] cannot be effectively vindicated after the trial has occurred." *Mitchell*, 472 U.S. at 525. This is because "the essence of [such] immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Id.*

The Fifth and Sixth Circuits have considered the possibility that *Mitchell*'s doctrine of appealability should govern in federal cases, like this case, that involve denials of claims of qualified official immunity based upon *state* law. *See Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988); *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). As both circuits noted, the parties in a diversity action, or

in a federal action such as this one involving pendent state claims, are bound by federal procedural rules governing appeals, including the collateral order doctrine. *Sorey*, 849 F.2d at 962; *Marrical*, 805 F.2d at 172; *see Budinich*, 108 S. Ct. at 1717; *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 541. However, we agree with each circuit that a *Mitchell* analysis, coupled with the teaching of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), dictates that

> the right to an interlocutory appeal from the denial of a claim of absolute or qualified immunity under state law can only exist where the state has extended an underlying substantive right to be free from the burdens of litigation arising from acts taken in the course of [official] duties.

Marrical, 805 F.2d at 172; *see also Sorey*, 849 F.2d at 962 (quoting and agreeing with above reasoning).

Our conclusion that the denial of a claim of qualified immunity premised upon state law is appealable only if the state has conferred an underlying substantive immunity from suits arising from the performance of official duties consequently necessitates an inquiry into whether New Jersey extends such an immunity to its officials. We must seek an answer to this question in New Jersey's Tort Claims Act and the cases that construe it. We think that we also may look to New Jersey's doctrine and procedural rules concerning interlocutory appeals in resolving this question. Although, as we have emphasized, federal procedural rules govern appealability in federal cases such as this one, New Jersey law concerning interlocutory appeals is useful insofar as it sheds light on whether a substantive immunity from suit exists for officials under New Jersey statutory and common law. *See*

Sorey, 849 F.2d at 962 (concluding that state procedural rules were useful for same purpose).

Unfortunately neither the text of the New Jersey Tort Claims Act nor New Jersey case law directly addresses the substantive issue whether state officials possess qualified immunity from suit or may only assert qualified immunity as a defense to liability.[4] In order to determine whether New Jersey law provides state officials with immunity from litigation, therefore, we must look to these two sources of New Jersey law and draw inferences from the policies that they express.

The policies undergirding the Supreme Court's decision in *Mitchell* arguably can be discerned in the New Jersey Tort Claims Act. The price of refusing to confer upon public officials immunity from suit as well as from ultimate liability for their reasonable actions is high. In the words of the Supreme Court in *Harlow v. Fitzgerald*, quoted at length in *Mitchell*, this price includes " 'the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.' " *Harlow*, 457 U.S. 800, 816 (1981), *quoted in Mitchell*, 472 U.S. at 526. The Task Force on the Tort Claims Act implicitly may have recognized

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[4] We also note that no case law on this point has evolved under California's Tort Claims Act, on which the New Jersey Act was based. *See Rochinsky v. State of N.J. Dep't of Transp.*, 110 N.J. 399, 407, 541 A.2d 1029, 1033 (observing that in various sections of its Tort Claims Act, New Jersey expressly adopted reasoning embodied in the California Tort Claims Act); *Lee v. Doe*, 232 N.J. Super. 569, 581, 557 A.2d 1045, 1050 (1989) (same).

these "costs" when it acknowledged a hand-in-glove relationship between effective government and official immunity from suit for discretionary decisions[5] and declared that " 'it cannot be a tort for the government to govern.' " N.J.S.A. 59:2-3 Task Force Comment, *quoting Amelchenko v. Freehold Borough*, 42 N.J. 541, 550, 201 A.2d 726, 731 (1964).[6]

That the Tort Claims Act was intended to confer a *Mitchell*-type immunity from suit upon public officials might also logically be inferred from the Act's primary and secondary purposes. The New Jersey Supreme Court has emphasized that "the plain meaning of [the statute] firmly establishes that 'immunity is the dominant consideration of the Act.' " *Rochinsky v. State of N.J. Dep't of Transp.*, 110 N.J. 399, 408, 541 A.2d 1029, 1034 (citations omitted). In light of this overriding purpose, the inference that the Act also confers immunity from having to

[5] To the extent that the Tort Claims Act is intended to confer official immunity, it seems primarily intended to confer such immunity for discretionary, as opposed to ministerial, actions. The New Jersey Supreme Court has held, however, that immunity for some ministerial acts exists under state law. *Rochinsky*, 110 N.J. at 1029, 541 A.2d at 1029; *see, e.g., Malloy v. State*, 76 N.J. 515, 388 A.2d 622 (1978) (interpreting N.J.S.A. 59:2-5, which confers immunity upon public entities for potential liability arising from the issuance, denial, suspension, or revocation of permits and licenses); *Wuethrich v. Delia*, 155 N.J. Super. 324, 382 A.2d 929, *certif. denied*, 77 N.J. 486, 391 A.2d 500 (1978) (construing N.J.S.A. 59:5-4 and 5-5, respectively concerning immunity from liability for failure to provide police protection and failure to make an arrest).

[6] The Task Force Comments on the Tort Claims Act have the precedential weight and value of legislative history. *Rochinsky*, 110 N.J. at 407 n.4, 541 A.2d at 1033 n.4 (1988).

litigate the consequences of reasonable actions seems strong.

The secondary purpose of the Act is to protect against "actions brought in hopes of imposing liability on theories not yet tested in the courts [that] could result in greatly expanding the amount of litigation and the attendant expense which public entities would face." N.J.S.A. 59:2-1 Task Force Comment. *See also Ayers v. Jackson Township*, 106 N.J. 557, 598 (1987), 525 A.2d 287, 308 (emphasizing Act's goal of deterring novel causes of action against public entities in declining to recognize plaintiffs' cause of action for unquantified enhanced risk of disease). Because public entities and officials may incur considerable expense defending against claims for which they ultimately are not found liable, interpreting the Act to confer immunity from suit, in addition to immunity from liability, would seem consistent with this policy of deterring novel causes of action.[7]

The Tort Claims Act's dominant consideration of immunity and policy of deterrence are equally consistent, however, with the view that the Act was intended to shield public officials and entities only from ultimate liability – and *not* initially from suit. Neither the language of the Act nor its legislative history directly addresses the

[7] We note in this regard that public entities, under New Jersey law, are obligated to defend police officers in suits arising from actions taken within the course of the officers' employment. *See* N.J.S.A. 40A:14-155; N.J.S.A. 59:10-4. Interpreting the Act to confer immunity from suit upon such officers, at least insofar as they are named as defendants in causes of action based on untested theories of liability, could spare public entities the costs of fully defending such suits.

immunity from suit concerns of *Mitchell v. Forsyth* that we previously have discussed. Indeed, all of the many sections of the Act that provide for or negate the immunity of public entities and employees speak solely in terms of immunity from liability and not of immunity from suit. *See, e.g.*, N.J.S.A. 59:2-2 (public entity "is not liable" for injury caused by adopting or failing to adopt or enforce any law); N.J.S.A. 59:3-10 (public employee acting in scope of employment "is not liable" for injury caused by misrepresentation); N.J.S.A. 59:4-8 (neither public entity nor public employee "is liable" for injury caused by condition of any unimproved public property).

New Jersey cases construing the Tort Claims Act also are consistent with the view that the Act was not intended to confer immunity from litigation upon the state's public officials. Although none of these cases address the *Mitchell* issue of immunity from suit, it seems noteworthy that they do speak explicitly in terms of immunity from *liability*. *See, e.g., Rochinsky*, 110 N.J. at 408, 541 A.2d at 1034 ("Even when one of the Act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity."); *Lee v. Doe*, 232 N.J. Super. 569, 581, 557 A.2d 1045, 1052 (interpreting section of Act concerning immunity for failure to provide police protection, and corresponding section of the California act on which it was based, to require "grant of immunity from liability").

The stated purpose and policy underlying the Tort Claims Act, as well as the cases construing it, may therefore be interpreted to cut against the view that the Act confers a *Mitchell*-type immunity from suit upon public officials and entities. That the Tort Claims Act and its

accompanying case law may be interpreted both to support and not to support a *Mitchell* immunity from suit does not cut powerfully enough against the possibility that the Act provides for a *Mitchell*-type immunity to decide the issue for us. Another factor, however, does.

As we have noted, New Jersey's procedural law concerning interlocutory appeals is relevant to our analysis insofar as it reveals whether a qualified immunity from suit, and therefore the right, provided for in *Mitchell*, to appeal an effective denial of this immunity, exists under New Jersey statutory and common law. Had a New Jersey court denied defendants' motion for summary judgment on plaintiff's tort claims, defendants could obtain appeal only by means of an interlocutory order and a motion for leave to appeal to the Appellate Division of the New Jersey Superior Court. *See* N.J. Ct. R. 2:2-4. In New Jersey, the power to grant leave to appeal interlocutory orders is "highly discretionary" and "exercised only sparingly" by New Jersey's appellate courts. *State v. Reldan*, 100 N.J. 187, 205, 495 A.2d 76, 86 (1985); *see also* Pressler, Current N.J. Court Rules, Comment 2:2-4. Indeed, a Justice of the New Jersey Supreme Court has observed that the New Jersey court rules reflect a policy that disfavors piecemeal reviews, has cautioned that "[i]nterlocutory review is exercised only in extraordinary cases," and has characterized the attitude of the state's courts toward most interlocutory appeals as "inhospitable." Clifford, *Civil Interlocutory Appellate Review in New Jersey*, 47 Law & Contemp. Probs. 87 (Summer 1984).

We conclude that the New Jersey courts' general reluctance to entertain interlocutory appeals, in tandem

with the absence of the clear expression of *Mitchell* concerns in either the Tort Claims Act or the state's case law, tips the balance toward non-appealability of the district court's denial of summary judgment for defendants on plaintiff's pendent claims.[8] We therefore will dismiss for lack of appellate jurisdiction defendants' appeals, based on the defense of qualified immunity under the New Jersey Tort Claims Act, from the district court's refusal to

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[8] In *Sorey v. Kellett*, a section 1983 action involving a pendent claim governed by Mississippi law, the Fifth Circuit reversed the district court's denial of defendants' motion for summary judgment based upon qualified immunity under state law. 849 F.2d at 961. As in this case, the state's courts had not directly considered whether, under state law, qualified immunity comprehended immunity from suit or merely constituted a defense to liability. The *Sorey* court, however, emphasized the state's common law rule that a successful defense of qualified immunity entitles an official to dismissal before trial. *Id.* at 962. The *Sorey* court also observed that the Mississippi Supreme Court had accepted interlocutory appeals of denials of immunity-based motions for summary judgment through a certification process similar to 28 U.S.C. § 1292(b). *Id.* As we have discussed, the New Jersey courts have evolved no such common law rule and are quite inhospitable to interlocutory appeals.

We think that this case is more similar to *Marrical v. Detroit News*, 805 F.2d at 169, in which the Sixth Circuit dismissed an appeal in a diversity action from a denial of a motion for summary judgment asserting qualified official immunity. The *Marrical* court noted that Michigan state courts were aware of the distinction drawn between immunity from suit and immunity from liability and concluded that there was "no reason to believe the Michigan Supreme Court . . . intended to afford state officers immunity from suit as well as from liability." *Id.* at 173.

grant them summary judgment on plaintiff's pendent state claims.

III. THE MERITS OF THE SUMMARY JUDGMENT MOTIONS

A. *Qualified Official Immunity and Standards for Summary Judgment*

In reviewing the district court's rulings on defendants' motions for summary judgment alleging qualified official immunity with respect to plaintiff's *federal* claims, we must apply the doctrine of qualified immunity and the summary judgment standards that have evolved under federal law. An appellate court reviewing the denial of a defendant's claim of qualified immunity must inquire "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions." *Mitchell*, 472 U.S. at 528. The *Harlow* Court held that this inquiry is an objective inquiry into whether the challenged official conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the Supreme Court further articulated this objective standard, holding that "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

Although *Mitchell*, *Harlow*, and *Anderson* clearly define the nature of our analysis in reviewing the district court's denial of defendants' claims of qualified immunity, these cases less clearly define the scope of our

review. Our inquiry into whether the Evans' asserted constitutional right of access to the civil courts was established with the requisite clarity at the time defendants allegedly violated it, for example, would seem to encompass inquiry into whether the right was recognized at all. The First Circuit has opined in dicta, however, that *Mitchell* so circumscribes the scope of appellate review that a reviewing court may not " 'even determine whether the plaintiff's allegations actually state a claim.' " *Bonitz v. Fair*, 804 F.2d 164, 166 (1st Cir. 1986) (quoting *Mitchell*, 472 U.S. at 528), *overruled on other grounds, Unwin v. Campbell*, 863 F.2d 124, 131 (1st Cir. 1988). From this perspective, we would have to confine our inquiry strictly to whether the right that Grabowski and Schwartz allegedly violated was clearly established and could not consider whether Evans' putative right was established in the first place.

We believe, however, that such a reading of *Mitchell* is unduly narrow. The *Mitchell* Court stated only that an appellate court reviewing the denial of a defendant's claim of qualified immunity "need not" consider whether the plaintiff stated a cognizable claim. 472 U.S. at 528. *Mitchell* therefore did not hold that a reviewing court may not address this issue, and properly so, for the inquiry that *Mitchell* mandates into whether the rights that a defendant official is alleged to have violated were clearly established at the time of his challenged actions may have to devolve into an inquiry into whether the legal norms that the defendant is alleged to have violated were recognized at all. *See id.; cf. Chinchello v. Fenton*, 805 F.2d 126, 132 (3d Cir. 1986) (suggesting that, although "the qualified immunity issue may be said to overlap with the legal issue on the merits" when defendant's alleged conduct in

no way breaches a rule of liability, immunity issue may nonetheless be sufficiently conceptually distinct to permit review). Indeed, it strikes us as both illogical and contrary to the interests of judicial economy to construe *Mitchell* to require that when a reviewing court determines that a constitutional right allegedly violated could not have been clearly established because it has not been recognized, the court may not directly so hold. We believe, therefore, that we properly address *infra* the issue whether plaintiff's allegation that Grabowski and Schwartz violated Evans' constitutional right to receive assistance in gaining access to the civil courts ultimately is constitutionally cognizable.

An additional issue pertaining to the scope of our review of the district court's decisions denying immunity is whether we may look beyond the allegations of plaintiff's complaint to the pre-trial record in determining whether the district court properly denied defendants' immunity-based motions for summary judgment. The propriety of such a relatively expansive review has been open to doubt. *Compare Turner v. Dammon*, 848 F.2d 440, 444 (4th Cir. 1988) (holding that, in determining whether claim of qualified immunity to section 1983 suit properly was denied, court of appeals should not confine itself to allegations in complaint, but also should inquire " 'whether . . . there is a genuine issue, triable to a jury,' of a clearly established constitutional violation") (citation omitted) *with Bonitz v. Fair*, 804 F.2d at 164 (holding that, on appeal of denial of claim of qualified immunity to section 1983 liability, review may encompass only allegations of plaintiff's complaint and not facts adduced as to

defendant's conduct); *Chinchello*, 805 F.2d at 130-31 (flagging, but not resolving, issue whether appellate court reviewing denial of claim of immunity may consider whether material dispute of fact exists).

Anderson, however, established a standard of review of denials of qualified immunity that requires analysis not only of the clear establishment of the right that an official is alleged to have violated, but also of the specific official *actions* alleged to have violated the right. *See* 483 U.S. at 640. *Anderson* thus appears to require a court faced with whether a claim of qualified immunity properly was denied to engage in an analysis of the facts adduced concerning the conduct of the official who claims immunity. *See Unwin v. Campbell*, 863 F.2d at 131 (holding that *Anderson*'s " 'fact-specific' " inquiry necessitated overruling previous circuit precedent holding that, on appeal of a denial of qualified immunity, court may look only to allegations set forth in plaintiff's complaint and not to pre-trial record concerning defendant's conduct).

Although we have not previously addressed this issue explicitly, we believe that we implicitly have held that *Anderson* requires appellate inquiry into whether the plaintiff has adduced evidence sufficient to create a genuine issue of material fact as to whether the defendant official engaged in the conduct alleged to have violated a clearly established right. *See Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087, 1092, 1096-97 (3d Cir. 1989) (citing *Anderson* and holding, *inter alia*, that a defendant was entitled to qualified immunity due to insufficient evidence that she engaged in conduct violative of clearly established constitutional right); *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d

Cir. 1989) (citing *Anderson* in holding that " 'fact-specific' " inquiry was required into whether defendants were entitled to assert qualified immunity as defense to section 1983 action), *cert. denied* 110 S. Ct. 840 (1990). We conclude that under *Anderson*'s fact specific standard for qualified immunity, as construed and applied by our precedents, we must determine whether the district court properly denied defendants' claims of qualified immunity in part by analyzing the evidence adduced by plaintiff as to the conduct of the defendants.

This evidentiary analysis is governed by the Supreme Court's trilogy of cases[9] defining the quantum of evidence sufficient to enable a nonmoving party to survive a motion for summary judgment. The trilogy's basic rule is that a motion for summary judgment will not succeed "if the dispute about a material fact is 'genuine.' " *Liberty Lobby*, 477 U.S. at 248. This standard, which mirrors the standard for directing a verdict, requires an inquiry into "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

B. *Count One: Right of Access to the Civil Courts – Was Summary Judgment Properly Denied?*

In count one, plaintiff alleges that Officer Schwartz and Detective Grabowski unlawfully interfered with and

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[9] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Co.*, 474 U.S. 574 (1986).

ultimately denied Evans her constitutional right of access to the civil courts. We note preliminarily that an individual's constitutional right of access to the courts is well settled. *See Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907) (deriving such right, in context of analyzing state wrongful death statute, from article four privileges and immunities clause and fourteenth amendment); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (fourteenth amendment due process clause assures citizens access to courts to present allegations that fundamental constitutional rights have been violated); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (first amendment rights of association encompass right of access to agencies and courts to be heard on applications for operating rights sought by competitors). A deprivation of the constitutional right of access to the courts clearly is actionable under section 1983. *See, e.g., Abdul-Akbar v. Wilson*, 901 F.2d 329 (3d Cir.) (holding that district court's denial of prisoner's sixth amendment right of meaningful access to the courts was actionable under section 1983), *cert. denied* 111 S. Ct. 239 (1990).

Plaintiff maintains that Grabowski and Schwartz denied Evans her constitutional right of access to the civil courts by failing to inform her adequately of her rights under New Jersey law. Plaintiff grounds this claim in Schwartz's and Grabowski's alleged violations of New Jersey's Domestic Violence Act, which directs police officers to inform a victim of domestic violence of her right to obtain at any time a temporary restraining order against her attacker in civil court. N.J. Stat. Ann. § 2C:25-7. The crux of plaintiff's contention is that the Act spells out a way in which the right of access to the courts,

constitutionally guaranteed and enforceable through 42 U.S.C. § 1983, may be protected. The district court, agreeing with the plaintiff, more fully delineated this position. The court concluded that the Act, from a constitutional perspective, does more for victims of domestic violence than simply to highlight for them the right of access to the courts. The court held, rather, that the Act, coupled with the constitutionally protected right of access to the courts, creates for New Jersey victims of domestic violence an expansive due process right to receive assistance in gaining civil court access.

In denying defendants' motions for summary judgment, the district court looked both to the Domestic Violence Act and to *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), a case in which a court applied equal protection scrutiny to police conduct in the context of domestic abuse. The district court emphasized, in particular, that the events in this case occurred four years after the New Jersey legislature enacted the Domestic Violence Act and three years after the Act became law. On the basis of the Act and the *Thurman* case, the court held that a due process right to receive assistance in gaining court access was, as required by *Mitchell*, *Harlow*, and *Anderson*, both clearly established and definite in its contours at the time that the events in this case transpired. Concluding that the record did not establish "that Schwartz and Grabowski operated independently" and that plaintiff had raised genuine issues of material fact as to whether the two officers had violated Evans' right to receive assistance in gaining access to the civil courts, the court denied summary judgment to defendants on plaintiff's civil court access claim.

Schwartz challenges the district court's denial of his qualified immunity defense to plaintiff's civil court access claim primarily on factual grounds. Schwartz asserts that his contact with Evans was fleeting and merely prefatory to her contact with Grabowski, the officer assigned to her case. Schwartz in substance contends that plaintiff can adduce no evidence to show that he reasonably could have known that the Domestic Violence Act applied to Evans' situation, much less incurred any obligation to assist her in obtaining access to the family court to obtain a restraining order against McKenzie. Grabowski challenges the denial of his qualified immunity defense to the civil court access claim primarily on legal grounds. Grabowski concedes that he failed to fulfill his obligations under the Domestic Violence Act. He asserts, however, that his failure to fulfill his obligations under the Act did not amount to a denial of Evans' constitutional right of access to the civil courts. The two defendants together ask us to hold that Evans had no constitutional right to receive assistance in gaining access to the courts – in essence, that plaintiff failed to state a cognizable constitutional claim. They also ask us to hold that plaintiff has established no genuine issue of material fact as to whether they acted to violate Evans' existing and circumscribed constitutional right of access to the civil courts.

Turning first to the issue whether Evans possessed a clearly established constitutional right – or any recognized constitutional right at all – to receive assistance in gaining access to the civil courts, it is certain that a violation of New Jersey's Domestic Violence Act, standing alone, is insufficient to give rise to a statutory or

constitutional claim under 42 U.S.C. § 1983. The plain language of section 1983, interpreted and underscored by the Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), only supports causes of action based upon violations, under the color of state law, of *federal* statutory law or constitutional rights. Section 1983 does not provide a cause of action for violations of state statutes, and, as the district court observed, a state statute cannot, in and of itself, create a constitutional right. *See Philadelphia Police and Fire Association for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 166-68 (3d Cir. 1989). In *Davis v. Scherer*, 468 U.S. 183, 194 (1984), moreover, the Supreme Court held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state] statutory or administrative provision." We believe that *Davis*, in tandem with the previous cases, renders the Domestic Violence Act effectively irrelevant to analysis of whether Evans, at the time of her encounter with Grabowski, had a clearly established *constitutional* right to receive assistance in gaining access to the civil courts. As a matter of law, therefore, plaintiff's intertwined claim of violations of Evans' statutory rights under the Domestic Violence Act and of her constitutional right of access to the courts is cognizable under section 1983 only if this constitutional right is expansive enough to encompass the state statutory rights.

The due process clause of the fourteenth amendment imposes upon state actors an obligation to refrain from preventing individuals from obtaining access to the civil courts. *See Wolff v. McDonnell*, 418 U.S. at 578-79; *Boddie v. Connecticut*, 401 U.S. 371 (1971); *see also Bell v. City of*

Milwaukee, 746 F.2d 1205, 1260-61 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). But only when the state has custody of an individual must its actors, to ensure that the individual receives due process, provide assistance in gaining access to the courts. *See Bounds v. Smith*, 430 U.S. 817 (1977) (fundamental right of access to the courts requires prison authorities to assist inmates in preparation and filing of meaningful legal papers); *cf. Wolff v. McDonnell*, 418 U.S. at 578-80 (fundamental right of access to the courts bars prison authorities from prohibiting inmates from providing assistance to one another in preparing civil rights actions).[10] Evans' constitutional right of access to the civil courts, therefore, does not appear expansive enough to encompass the right to receive assistance in gaining court access accorded to her by New Jersey's Domestic Violence Act.

Plaintiff's combined statutory and constitutional claim is, at core, coterminous with her claim that Grabowski and Schwartz violated Evans' due process right to police protection, on which the district court granted summary judgment for the defendants. Each claim ultimately is governed by the Supreme Court's decision in

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[10] The constitutional right of access to the courts also comprehends a right to learn facts necessary to seek redress for constitutional violations of individual rights. *Bell v. City of Milwaukee*, 746 F.2d at 1205; *Ryland v. Shapiro*, 708 F.2d at 967. For the indigent, this constitutional right may encompass a right not to have to pay legal fees that could bar them from asserting basic rights. *See Boddie v. Connecticut*, 401 U.S. at 371 (due process clause prohibits state from denying individuals unable to pay required fees their right of access to civil courts to obtain dissolution of marriage).

DeShaney, which we applied in *Philadelphia Police and Fire Association*, 874 F.2d at 156. *DeShaney* establishes a line, conceptually distinct, although sometimes difficult to draw, between a state's obligation to refrain from depriving its citizens of life, liberty, or property without due process of law, and a state's affirmative obligation to protect its citizens from such deprivations at the hands of private actors. *DeShaney*, 109 S. Ct. at 1002-04, 1008-09. *DeShaney* held that in the absence of an affirmative exercise of state power that "so restrains an individual's liberty that it renders him unable to care for himself," a state has no positive duty to ensure that the individual's life, liberty, or property "do not come to harm through other [than state] means." *Id.* at 1005, 1003.[11] As we stated in *Philadelphia Police and Fire Association*, "*DeShaney*

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[11] In *DeShaney*, a mother, on behalf of her infant son, brought a section 1983 action alleging that the Winnebago Department of Social Services had deprived the son of his liberty interest in bodily integrity in violation of his substantive due process rights under the fourteenth amendment. *Id.* at 1002. For more than a year, the Department of Social Services had received, from hospital personnel and those who knew the child, information strongly suggesting that his father was abusing him. *Id.* at 1001-02. Due to his father's continual beatings, the child sustained brain damage so severe that he fell into a life-threatening coma and is now profoundly retarded. *Id.* at 1002. The child's mother contended that the Department, because it should have been or actually was aware of the danger to her child, had a constitutional obligation to intervene to protect him from his father. *Id.* The Supreme Court, however, emphasized that the father – not the Department of Social Services – had harmed the child and held that the Department's failure to provide the child with adequate protection did not amount to a deprivation of his due process rights. *Id.* at 1007.

begins with the proposition that in general the due process clause only restricts state action; it does not obligate the state to protect its citizens from one another." 874 F.2d at 167.

Plaintiff in substance responds that the Domestic Violence Act, which clearly was applicable to Evans' situation, created a relationship akin to custody between Evans and officers Grabowski and Schwartz, thus constituting an exception to the general rule enunciated in *DeShaney* and obligating the officers to provide Evans with assistance in gaining access to the civil courts. The dissent in *DeShaney* indeed urged that statutory or other action taken by a state to protect a class to which an individual belongs constitutes the most appropriate vantage point from which to begin analyzing whether a state unconstitutionally deprived an individual of due process rights. 109 S. Ct. at 1008-09 (Brennan, J., dissenting). From this perspective, "a State may be found complicit in an injury even if it did not create the situation that caused the harm." *Id.* at 1009. This, however, was not the perspective adopted by the *DeShaney* majority, whose holding we were constrained to follow in *Philadelphia Police and Fire Association* and are constrained to follow now.

The plaintiffs in *Philadelphia Police and Fire Association* contended, similarly to the plaintiff in this case, that the operation of a Pennsylvania statute, which provided that all mentally retarded citizens would receive adequate services, created a special relationship between the state and these citizens, obligating the state to continue its protection of them. 874 F.2d at 166. We noted in *Philadelphia Police* that a protective statute also underlay the

plaintiff's claim in *DeShaney*. *Id.* In words equally applicable to this case, we held that the "cessation of action by the state . . . in no way differs from the *DeShaney* situation. Just as in *DeShaney*, the retraction of state intervention permits the harm, but the harm in each case actively is caused by a source other than the state." *Id.* at 167.

Plaintiff's allegation that the Domestic Violence Act and the constitutional right of access to the civil courts together gave Evans a constitutional right to receive assistance in gaining civil court access, therefore, does not constitute a cognizable constitutional claim under section 1983. Plaintiff appears further to contend, however, that even if the Domestic Violence Act and the due process clause did not create for Evans a right to receive assistance in gaining civil court access, Grabowski and Schwartz, through their actions, did create such a right. Plaintiff points to the *DeShaney* Court's holding that a state may incur an affirmative duty to assist or protect an individual, if it imposes limitations "on his freedom to act on his own behalf." 109 S. Ct. at 1006. Plaintiff argues that there are strong factual analogies between this case and cases in which courts have premised a state actor's constitutional liability for the failure to provide adequate assistance or protection upon the state's special relationship to an individual or its role creating a special danger to the individual from a private actor. Plaintiff relies, in particular, upon two recent cases decided by other circuits – *Cornelius v. Town of Highland Lake, Alabama*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990), and *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 112 L. Ed. 2d 305 (1990).

In *Cornelius*, two prisoners assigned to a community work squad abducted the plaintiff from the town hall where she worked and held her hostage for a period of three days, during which they repeatedly threatened to sexually assault and kill her. *Id.* at 350. The plaintiff brought a section 1983 action against the town, several of its officials, and members of the state department of corrections, alleging that they had violated her constitutionally protected liberty interests. *Id.* at 349. The plaintiff contended that the town and its officials had a special relationship with her, akin to custody, because her employment as Town Clerk required her to work in the town hall building in which the prisoners also regularly worked. *Id.* at 355. She further contended that each of the defendants, by permitting violent criminals to be assigned to the work squad and then failing to supervise them adequately, contributed to create a special danger to her. *Id.* at 351.

The district court in *Cornelius* found that no special relationship existed between the plaintiff and the defendants that could give rise to a constitutional duty to protect her from the work squad prisoners and granted summary judgment for the defendants. *Id.* at 349. The court of appeals reversed, holding that the plaintiff had presented evidence that established genuine issues of material fact as to whether the defendants had a special relationship with the plaintiff and were aware that the work squad prisoners posed a special danger to her. *Id.* The court, harmonizing its holding with *DeShaney*, emphasized "the degree of control the town officials exercised over [the plaintiff] as Town Clerk" and that the

defendants "increased [her] vulnerability to harm by regularly exposing her to the work squad inmate by virtue of her position." *Id.* at 355-56. The court, emphasizing the degree of control that the defendants exercised over the prisoners who harmed the plaintiff, also distinguished *Martinez v. California*, 444 U.S. 277 (1980), in which the Supreme Court held that a parole board was not subject to liability under section 1983 for a murder committed by a parolee five months after his release from prison.

In *Wood*, the defendant, a state trooper, arrested a driver for intoxication, impounded the driver's car, and left the plaintiff passenger stranded alone in a high-crime area in the early hours of the morning. 879 F.2d at 586. As she attempted to make her way home, the plaintiff accepted a ride from a male stranger and was raped. *Id.* Plaintiff, in a section 1983 action against the trooper, alleged that his impoundment of the car in which she was travelling distinguished her from the general public and triggered an established constitutional duty to protect her liberty interests by seeing to her safety. *Id.* at 590. The district court granted summary judgment for the defendant on the ground that he owed the plaintiff no constitutional duty of protection and was entitled to good faith qualified immunity. *Id.* at 586. The court of appeals reversed, holding that the plaintiff had raised triable issues of fact as to whether the defendant affirmatively and with deliberate indifference had placed her in danger and then breached a due process duty of protection. *Id.* at 589-90.

We are, of course, not bound by *Cornelius* and *Wood*. At all events, we believe that the evidence introduced in

Cornelius and in *Wood* contrasts in important respects with that offered in this case.

In *Cornelius*, the plaintiff introduced evidence that the defendants who employed her exercised a control over her work environment that arguably was sufficient to create a special, quasi-custodial relationship between them. The *Cornelius* plaintiff also supplied evidence that the defendants, prior to the prisoners' escape, had custody of them and were aware or should have been aware that the prisoners posed a special danger to her. In the case at bar, the evidence that plaintiff has adduced with respect to Schwartz is gossamer. Plaintiff's evidence establishes only that Schwartz took Evans' statement and, consistent with Roselle police policy, passed on the information that he obtained to detective Grabowski for further investigation and action. Plaintiff, moreover, has provided no evidence that Grabowski, the officer assigned to Evans' case, in any way constrained either her general liberty or her freedom of her own accord to seek protection from McKenzie in the civil courts. Plaintiff also has failed to supply any evidence that either Schwartz or Grabowski had custody of McKenzie prior to his initial kidnapping and assault of Evans – a factor that might have triggered a constitutional duty on their parts to assist Evans subsequently in obtaining court protection from him. Indeed, McKenzie, like the individual who murdered the plaintiff's decedent in *Martinez*, was a parolee subject only to the limited control of a state parole board.

In *Wood*, the plaintiff introduced evidence that the defendant acted to place her in a perilous situation and

then, with deliberate indifference to her danger, abandoned her. Once again, plaintiff in this case has adduced no evidence to show that Schwartz's contact with Evans was more than fleeting and merely prefatory to her contact with Grabowski. Plaintiff, moreover, has shown only that Grabowski failed to advise Evans of her rights under the Domestic Violence Act or otherwise. In contrast to the plaintiff in *Wood*, she has supplied no evidence that Grabowski, much less Schwartz, acted to create or to exacerbate the danger that McKenzie posed to Evans, thereby triggering a possible constitutional duty to assist her in gaining access to the civil courts.

In sum, Evans' constitutional right to receive assistance in gaining access to the civil courts could not have been established with the clarity required by *Mitchell*, *Harlow*, and *Anderson*, at the time that Grabowski and Schwartz allegedly violated it, because Evans possessed no such right. The constitutional right of access to the civil courts plainly does not encompass a right to receive assistance in gaining access to the civil courts. Ultimately, then, under the facts at bar, plaintiff's section 1983 civil court access claim is not constitutionally cognizable. Moreover, under *DeShaney* and *Philadelphia Police and Fire Association*, the Domestic Violence Act cannot be construed as creating either a quasi-custodial relationship between defendants and Evans or any concomitant constitutional duty on their part to assist Evans in seeking protection from her assailant in the civil courts. Defendants' failure to inform Evans of her rights under New Jersey's Domestic Violence Act simply does not amount to a violation of Evans' constitutional right of access to

the courts. We note that plaintiff has supplied no evidence to show that Schwartz had sufficient knowledge of Evans' prior cohabitation with McKenzie even to trigger his duties under the Domestic Violence Act. Grabowski could and should have instructed Evans as to her rights under the Act. He was not, however, constitutionally compelled to do so.

Finally, from a more factual perspective, plaintiff has adduced insufficient evidence to create a genuine issue of material fact as to her claim that Grabowski, much less Schwartz, acted so as to create a special relationship with Evans, triggering a constitutional duty to assist her in obtaining protection from McKenzie in the civil courts. Plaintiff has provided no evidence to show, as *DeShaney* would appear to require, that either defendant affirmatively barred the door to the civil courts to Evans, that he otherwise limited her freedom to act on her own behalf, or that he created or exacerbated the danger that McKenzie posed to her.

Given Grabowski's position of responsibility, the role of inert spectator to an unfolding tragedy that he chose to play is extremely disturbing. We believe, however, that the cases establishing and defining the constitutional right of access to the courts, the Supreme Court's holding in *DeShaney*, and our decision in *Philadelphia Police and Fire Association*, coupled with the evidence that plaintiff has adduced, cannot be interpreted so as to uphold the district court's decision denying either defendant's motion for summary judgment on plaintiff's civil court access claim. We therefore will reverse the district court's denial of summary judgment to Grabowski and Schwartz on this claim.

C. *Count Three: The Equal Protection Claim*

In count three, plaintiff claims that Grabowski and Schwartz, by failing to comply with New Jersey's Domestic Violence Act, breached their constitutional duty to enforce the state's laws equally and fairly, in violation of Evans' fourteenth amendment right to equal protection. She further alleges that defendants' failure to provide Evans with adequate protection resulted from a discriminatory animus toward victims of domestic violence, who primarily are women.

In developing her equal protection claim, plaintiff relies, as did the district court, on our decision in *Hynson v. City of Chester Legal Department*, 864 F.2d 1026 (3d Cir. 1988). In *Hynson*, we took note of the "growing trend of reliance on 42 U.S.C. § 1983 to bring an action against the police alleging that the policies used in handling domestic abuse cases violate the equal protection of women victims." *Id.* at 1027. We then announced a new precedent setting forth the requirements for stating an equal protection claim grounded in the unequal treatment of victims of domestic violence. We held that

> [i]n order to survive summary judgment, a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination against women was a motivating factor, and that the plaintiff was injured by the policy or custom.

Id. at 1031 (footnote and citations omitted).

After setting forth the "prima facie" requirements for stating a constitutional claim of gender-based discrimination in police policies toward victims of domestic violence, we further determined, in *Hynson*, what a plaintiff must establish to overcome an official's assertion of qualified immunity. We held that, under *Harlow* and *Anderson*, the right to equal protection of a woman subjected to domestic violence must be both established and clear in its contours before an individual police officer loses qualified immunity from suit for its violation. *Id.* at 1032. We concluded that

> . . . a police officer loses a qualified immunity to a claim that a facially neutral policy is executed in a discriminatory manner only if a reasonable police officer would know that the policy has a discriminatory impact on women, that bias against women was a motivating factor behind the adoption of the policy, and, that there is no important public interest served by the adoption of the policy.

Id.

The district court denied defendants' motions for summary judgment, based on qualified immunity, on plaintiff's equal protection claim, opining that defendants' contention that they violated no clearly established equal protection right in their dealings with Evans "strains credulity." We might well agree, at least with respect to Grabowski, had the events that led to this action occurred at a later point in time.[12]

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[12] Plaintiff points to Grabowski's reluctance to file sexual assault and kidnapping charges against McKenzie once he

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In *Hynson*, however, we announced that we had, "perhaps for the first time in a published opinion," articulated a standard for the district courts in this circuit to follow in section 1983 cases arising from domestic violence. *Hynson*'s self-conscious announcement of a new equal protection rule for this circuit occurred in December of 1988 – nearly three years after the events giving rise to this action took place. Our research indicates that prior to January of 1985, when Evans sought the assistance and protection of the Roselle police, only one decided case, from another jurisdiction, dealt with equal protection rights in the context of an allegedly discriminatory implementation of a police policy concerning domestic violence.[13]

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learned that McKenzie and Evans had at one time lived together in an intimate fashion. Plaintiff further relies upon Grabowski's dismal record regarding domestic assaults. Grabowski himself admitted that he had not filed a single domestic violence complaint or report from the time the New Jersey Domestic Violence Act was enacted in 1982 until Evans' murder in 1985. Plaintiff supplied evidence that Grabowski, in addition, made a practice of not informing victims, such as Evans, of their rights and options under the Act.

Plaintiff's evidence against Schwartz is much more slender. Plaintiff established that Schwartz, like Grabowski, failed to inform Evans of her rights and options under the Domestic Violence Act. She also showed that Schwartz had failed to file a domestic violence report in Evans' case. Schwartz asserted, however, that in Evans' case he served only as a conduit to Grabowski and that it was his regular practice both to provide victims of domestic violence with information concerning their rights and to file domestic violence reports. Plaintiff supplied no evidence to refute this assertion.

[13] In denying summary judgment to defendants, the district court relied upon this case, *Thurman v. City of Torrington*,

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Our research also suggests that scholarship on the right to equal protection of victims of domestic abuse mainly postdates the period in which the events in this case took place. *See* Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 Wm. & Mary L. Rev. 263 (1987) (providing some discussion of equal protection rights in the context of law enforcement and domestic violence); Zimring, *Legal Perspectives on Family Violence*, 75 Calif. L. Rev. 521 (1987) (same); Case Comment, *Gender-Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints:* Thurman v. City of Torrington, 75 Geo. L.J. 667 (1986); Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 Yale L.J. 788 (1986); *but see* L. Armstrong, *The Home Front: Notes From the Family War Zone* (1983) (urging that victims of domestic

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595 F. Supp. at 1521, which held that the plaintiff, who claimed that she was injured because the police applied an administrative classification so as to discriminate against women complaining of domestic abuse, stated a cognizable claim under section 1983 for the violation of her right to equal protection. *Id.* at 1526-29.

With the exception of *Thurman*, the cases cited in *Hynson*, by plaintiff, and by the district court as delineating the evolving right to equal protection of victims of domestic abuse, all were decided well after January of 1985. *See Hynson*, 864 F.2d at 1027 n.1 (citing *Watson v. Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Dudosh v. City of Allentown*, 665 F. Supp. 381 (E.D. Pa. 1987), *reh'g denied sub nom Dudosh v. Warg*, 688 F. Supp. 944 (E.D. Pa. 1987), *vacated in part*, 853 F.2d 917 (3d Cir. 1988); *Sherrell ex. rel. Wooden v. City of Longview*, 683 F. Supp. 1108 (E.D. Tex. 1987)).

violence should be accorded basic security afforded by the law and the equal protection clause); Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 59 Calif. L. Rev. 1657 (1981) (non-enforcement of assault laws against victims of domestic violence violates the equal protection clause of the fourteenth amendment).

Our survey of these cases and materials strongly suggests that, in 1985, the equal protection rights of domestic violence victims were far less recognized and defined than they are today. We believe that *Thurman*, *see supra* note 13, a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim, such as Evans, to enable reasonable officials to " 'anticipate [that] their conduct [might] give rise to liability for damages.' " *Anderson*, 483 U.S. at 646 (quoting *Davis*, 468 U.S. at 195). *Anderson*'s strict elaboration of *Harlow*, establishing that an official is entitled to summary judgment on grounds of qualified immunity, unless the right that the official is alleged to have violated is both clearly established and clear in its contours, may produce distressing results in cases such as this one.[14] We believe, however, that *Harlow*, *Anderson*, and our recent

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[14] *Anderson*'s rule has, for this reason, received criticism. *See* Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 49 (1989) (criticizing *Anderson*'s holding for its "adoption of a standard that looks to whether . . . conduct had been previously clearly proscribed in a setting where the constitutional standard itself is defined by notions of reasonableness" and, therefore, for unduly circumscribing constitutional rights).

decision in *Hynson* compel the holding that Grabowski and Schwartz are entitled to qualified immunity with respect to plaintiff's equal protection claim. We therefore will reverse the district court's decision denying summary judgment to defendants on this claim.

D. *Count IV: Individual Liability of Police Chief Trolan*

In the fourth count of her complaint, plaintiff claims that the Roselle Police Department, the Borough of Roselle, and Chief Trolan, in both his individual and official capacities, violated Evans' right to equal protection, her right of access to the courts, and various other of her due process rights. Plaintiff claims, *inter alia*, that Trolan individually is liable for these violations of Evans' rights, because he failed to train and supervise his officers adequately. We concluded *supra* that although we lack jurisdiction over the appeals of the Department, the Borough, and Chief Trolan in his *official* capacity, we clearly have jurisdiction over Trolan's appeal, in his *individual* capacity, from the district court's denial of his claim that he is entitled to summary judgment on count four on grounds of qualified immunity.

The district court denied summary judgment to all of the defendants named in count four. In arriving at this decision with respect to Trolan in his individual capacity, the district court relied exclusively on precedents governing *municipal* liability.[15] The court did not consider

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[15] The district court, for example, analyzed whether plaintiff, as required by *City of Los Angeles v. Heller*, 475 U.S. 796,

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precedents, such as *Rizzo v. Goode*, 432 U.S. 361 (1976), or our decision in *Chinchello v. Fenton*, 805 F.2d 126 (3d Cir. 1986), which, at the time that the events giving rise to this case transpired, governed an official's liability, in his *individual* capacity, for violations of constitutional rights arising from the official's putative failure to train and supervise subordinates adequately. Indeed, the district court, in contending with the numerous issues that count four raises concerning municipal liability, did not specifically address whether Trolan, sued in his individual capacity, possesses qualified immunity from suit for the violations of Evans' constitutional rights allegedly arising from his failure to train and supervise his officers properly.

We believe that, at the time the events giving rise to this case occurred, the case law governing an individual's right to have a supervisory official take steps to ensure that subordinate police officers would not violate the individual's constitutional rights compels the conclusion that Trolan, in his individual capacity, possesses qualified

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798-99 (1986), had predicated the alleged derivative liability of the *municipal* defendants upon actual violations of constitutional rights by individual officers. The district court also emphasized the municipal plan or policy nexus necessary to trigger liability under section 1983, which the Supreme Court established in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The district court looked, in addition, to *City of Canton v. Harris*, 109 S. Ct. 1197 (1989), in which the Supreme Court held that a *municipality's* failure to train police officers may give rise to section 1983 liability when that failure demonstrates deliberate indifference to the constitutional rights of those with whom the police come in contact. *Id.*

immunity to plaintiff's claim in count four. *Rizzo*, as well as several of our precedents prevailing at the time, condition the liability of a supervisory official for constitutional violations perpetrated by subordinate police officers upon the official's direct and active involvement in the violations. The *Rizzo* Court overturned a district court order compelling individual city officials to afford sweeping equitable relief to the plaintiffs, because the defendant officials, in contrast to subordinate police officers, had not been found "by their *own* conduct" to have violated the plaintiffs' constitutional rights. 432 U.S. at 377 (emphasis in original). We subsequently held that, under *Rizzo*, city officials could not be held liable or compelled to afford equitable relief for violations of constitutional rights committed by subordinate police officials, unless they had "played an affirmative role in the deprivation of [those] rights." *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306, 336 (3d Cir. 1981), *cert. denied* 458 U.S. 1121 (1982); *accord Black v. Stephens*, 662 F.2d 181, 189 (3d Cir. 1981) (Under *Rizzo*, police chief may only be held liable for subordinate officer's unconstitutional activity if he participated in pattern of violation), *cert. denied* 455 U.S. 1008 (1982); *Lewis v. Hyland*, 554 F.2d 93, 98 (3d Cir.) (injunctive relief against state police officials properly denied absent showing of participation or direct involvement in violations of constitutional rights perpetrated by subordinate officers), *cert. denied* 434 U.S. 931 (1977). These governing precedents stand for the proposition that, in the context of police action, an official's mere – and even callous – inaction in the face of subordinate officers' unconstitutional actions clearly does not suffice to render the official liable for those actions. *Rizzo*, 423

U.S. at 376; *Black*, 662 F.2d at 189; *Porter*, 659 F.2d at 336-37; *Lewis*, 554 F.2d at 98-99.

In *Chinchello*, a precedent that also governed at the time that the events giving rise to this case occurred, we applied *Rizzo* and our decisions concerning an official's constitutional liability for the failure to train and supervise subordinates in the context of an appeal, akin to Trolan's, from the denial of a claim of qualified immunity to a *Bivens* action alleging that the defendant official had violated the plaintiff's rights through his failures to train and supervise. 805 F.2d at 126. We concluded that *Rizzo* and our decisions stood for the proposition that "a supervising public official has [no] affirmative constitutional duty to supervise and discipline so as to prevent violations of constitutional rights by his or her subordinates." *Id.* at 133. We therefore held that the official's failure to train, supervise, and discipline subordinates could not, absent a showing of the official's direct involvement in the subordinates' unconstitutional actions, amount to the violation of a clearly established constitutional duty and that he was entitled to qualified immunity. *Id.* at 134.[16]

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[16] As the district court noted, *see supra* note 15, the Supreme Court, in *City of Canton v. Harris*, 109 S. Ct. at 1204, held that a municipality's failure to train police officers adequately may give rise to liability under section 1983 "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." In *Stoneking v. Bradford Area School District*, 882 F.2d 720, 725 (3d Cir. 1989), we held that, under *City of Canton*, a school official may be held liable in an individual, as well as an official, capacity when the official, with deliberate indifference to the consequences, establishes or maintains a policy, practice, or custom

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Plaintiff has presented considerable evidence that Chief Trolan presided over a detective bureau that was carelessly apathetic at best and grievously incompetent at worst. As we have detailed, the Union County prosecutor's office found that the Roselle Police Department's Detective Bureau completely lacked supervision, accomplished little work, filed few reports on the numerous cases assigned to it, and did nothing to follow up on crimes involving domestic violence. Plaintiff has supplied no evidence, however, that Chief Trolan directed or affirmatively participated any of the actions claimed to have deprived Evans of her constitutional rights and, ultimately, her life. Under *Rizzo*, *Chinchello*, and the other decisions that we have discussed, Trolan's failure to train and supervise his subordinates, regardless of how inept and careless that failure may have been, cannot be held, consistent with *Mitchell*, *Harlow*, and *Anderson*, possibly to have violated a constitutional right on Evans' part that

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that directly causes a deprivation of the constitutional rights of a student. *See also Sample v. Diecks*, 885 F.2d 1099, 1117-18 (3d Cir. 1989) (holding, in context of section 1983 action against prison officials for unconstitutional detention, that "the standard of individual liability for supervisory public officials" could be no less stringent than the "deliberate indifference" standard for municipal liability established in *City of Canton*). This case, however, is distinguishable from *Stoneking* in which we held that various school officials, sued in their individual, as well as official, capacities, were not entitled to summary judgment on plaintiff's claim that, from 1979 through 1985, they established or maintained a policy, practice, or custom of ignoring student complaints of sexual molestation by a teacher, with deliberate indifference to the consequences. *See* 882 F.2d at 722-25.

was clearly established and clear in its contours. We therefore will reverse the district court's decision denying summary judgement to Trolan in his individual capacity on plaintiff's claim that, due to his failure to train and supervise his officers adequately, he violated Evans constitutional rights.

IV. CONCLUSION

In sum, we hold that defendants Grabowski and Schwartz are entitled to summary judgment on plaintiff's claims that they denied Evans her constitutionally protected right of access to the civil courts and her right to equal protection. We also hold that defendant Trolan is entitled to summary judgment, in his individual capacity, on plaintiff's claim that, through failing to train and supervise his officers adequately, he violated Evans right to equal protection, her right of access to the courts, and other of her due process rights. We therefore will reverse the district court's denials of summary judgment to these defendants on these claims and remand the case to the district court with the direction to grant summary judgment thereon.

Due to the absence of finality, we conclude that we have no jurisdiction over plaintiff's appeal of the district court's decisions dismissing her criminal court access claim and granting summary judgment to defendants Grabowski and Schwartz on plaintiff's claim that they violated Evans' right to due process by failing to afford her adequate protection. We conclude that, in the absence of finality, we also have no jurisdiction over the appeals by Chief Trolan, in his official capacity, the Roselle Police

Department, and the Borough of Roselle from the district court's denial of summary judgment on plaintiff's claim that these defendants violated Evans' constitutional rights. In light of our holding that the New Jersey Tort Claims Act does not confer immunity from suit upon the defendants, we further conclude that we lack jurisdiction over the appeals by Grabowski, Schwartz, Trolan, the Roselle Police Department, and the Borough of Roselle from the district court's decision denying their motions for summary judgment on plaintiff's pendent state tort claims. These appeals therefore will be dismissed and the remaining claims in this the case remanded for further proceedings.[17]

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[17] Because we have concluded that Grabowski, Schwartz, and Chief Trolan, sued in his individual capacity, are entitled to summary judgment, on remand these individuals will be pendent parties to the state tort claims comprising part of plaintiff's ongoing action. The district court therefore will have to determine whether it has pendent party jurisdiction over these defendants.

We note that Congress recently resolved this problem for the future by enacting legislation that prospectively provides the federal courts, in actions over which they have original jurisdiction, with supplemental jurisdiction over claims arising from the same case or controversy and that "involve the joinder or intervention of additional parties." S. 2648, 101st Cong., 2d Sess., 135 Cong. Rec. 17901, 17911-12 (daily ed. Oct. 27, 1990). Because this legislation is prospective in nature, however, the district court will have to look to prior case law to determine whether it has pendent party jurisdiction over Grabowski, Schwartz, and Trolan, in his individual capacity, with respect to plaintiff's state claims. *See Finley v. United States*, 109 S. Ct. 2003 (1989) (rejecting pendent party jurisdiction under

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the Federal Tort Claims Act); *Aldinger v. Howard*, 427 U.S. 1 (1976) (rejecting pendent party jurisdiction over county in section 1983 action); *see also Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 363, 372 n.12 (1978) (*Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), may have called into question the Court's decision in *Aldinger* as to pendent party jurisdiction over counties, but "in no way qualifies the holding of *Aldinger* that jurisdictional questions [concerning pendent party jurisdiction] are statutory as well as constitutional"). For our precedents concerning pendent party jurisdiction, see generally *Abromovage v. United Mine Workers of America*, 726 F.2d 972, 989-92 (3d Cir. 1984) (established three-tiered analysis for whether exercise of pendent jurisdiction is appropriate); *Kuehner v. Schweiker*, 717 F.2d 813, 828 n.17 (3d Cir. 1983) (Becker, J., concurring) (opining that pendent party jurisdiction provided basis for jurisdiction over pendent state defendants in action based upon Social Security Act and federal mandamus statute).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5487, 89-5532

REGINA BROWN, ADMINISTRATRIX and
Administratrix Ad Prosequendum of
the Estate of DEBBIE EVANS

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE

Felix Grabowski, William
Schwartz, Vincent F. Trolan,
and the Borough of Roselle,
Appellants in 89-5487

Regina Brown,
Appellant in 89-5532

(D.N.J. Civ. No. 86-4895)

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: HIGGINBOTHAM, *Chief Judge*, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*.

The petition for rehearing filed by Appellant Regina Brown, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 29 1991

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

REGINA BROWN, Administratrix and Administratrix-ad-Prosequendum of the Estate of DEBBIE EVANS,	:	Civil Action No. 86-4895
Plaintiffs,	:	OPINION
v.	:	
DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ASSISTANT PROSECUTOR WILLIAM DANIEL, individually and as an assistant prosecutor of the Union County Prosecutor's Office, New Jersey; PROSECUTOR JOHN STAMLER, individually and as Prosecutor of the Union County Prosecutor's Office, New Jersey; ROSELLE POLICE DEPARTMENT; THE UNION COUNTY PROSECUTOR'S OFFICE; THE BOROUGH OF ROSELLE and THE COUNTY OF UNION,	:	
Defendants.	:	

APPEARANCES:

WILENTZ, GOLDMAN & SPITZER
By: Barry T. Albin, Esquire
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
(Attorneys for Plaintiff)

KALB, FRIEDMAN, SIEGELBAUM
AND MORAN
By: James M. Andrews, Esquire
Seven Becker Farm Road
Roseland, New Jersey 07068
(Attorneys for Defendants Felix
Grabowski, William Schwartz,
Vincent F. Trolan, Roselle Police
Department and Borough of
Roselle)

BISSELL, *District Judge*

This matter arises before the Court on the basis of a motion for summary judgment by the remaining defendants on all five counts of the complaint filed by Regina Brown, administratrix and administratrix ad prosequendum of the decedent, Debbie Evans.

I. FACTS AND BACKGROUND

The events which led to the filing of this cause of action are set forth at length in this Court's opinion of September 29, 1987. In brief, the plaintiff alleges that between January 9 and 12, 1985, the decedent and others provided the Roselle police with sufficient evidence of violent acts by her cohabitant of about one year (Clifton McKenzie who was at that time compulsorily committed to custody in Integrity House, in Newark, New Jersey, for rehabilitation from drug addiction), to afford them notice

of her need for special protection and to trigger their duty to inform her of her rights to file a domestic violence complaint against him pursuant to the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-1 *et seq.* (the Act). Plaintiff alleges that the defendants' failure to protect Evans resulted in her death at McKenzie's hands on or about January 14, 1985.

In the orders accompanying the two opinions of September 29, 1987, the Court ordered as follows:

1. All causes of action brought against four of the original defendants, the Union County Prosecutor's Office, Union County, Union County Prosecutor John Stamler, and Assistant Union County Prosecutor William Daniel, were dismissed;

2. The motion by Detective Felix Grabowski and Patrolman William Schwartz for dismissal of all four counts of the complaint (as it was then formulated) was denied;

3. The motion by Roselle Police Chief Vincent Trolan, the Borough of Roselle and the Roselle Police Department (Roselle defendants) for dismissal of plaintiff's fourth cause of action (state common law negligence, now set forth in Count V) was denied;

4. The motion by the three Roselle defendants for dismissal of the first three causes of action was granted without prejudice, and the Court gave plaintiff 20 days within which to file an amended complaint. Because an amended complaint was timely filed, plaintiff's first three causes of action against the Roselle defendants, now set forth in Count IV, were reinstated.

Accordingly, for purposes of the present motion, there remain five defendants and five causes of action which allege the following violations of the rights of decedent Debbie Evans:

Count I: When the defendant police officers failed to inform Evans of her right to file a domestic violence complaint pursuant to N.J.S.A. 2C:25-1 *et seq.* or to arrest her cohabitant Clifton McKenzie pursuant to N.J.S.A. 2C:25-5, they denied the decedent's constitutional right of access to the courts (pursuant to 42 U.S.C. § 1983), the privileges and immunities clause of article IV of the Constitution, and the fourteenth amendment. (Amended Compl., ¶¶ 39, 53, 56, 63).

Count II: After Officers Grabowski and Schwartz had created a "special relationship" with Evans, they breached their affirmative duty to provide her with protection, either by arresting McKenzie or otherwise, and so violated her constitutional rights (pursuant to the Act). (Amended Compl., ¶¶ 69-73).

Count III: When the officers provided the decedent with "lesser protection" because she was a victim of domestic violence and failed to provide her with access to civil court they violated the Act and denied the decedent's constitutional right to equal protection of the laws. (Amended Compl., ¶¶ 79-81).

Count IV: The three Roselle defendants deprived the decedent Evans of her constitutional rights of access to the courts, of police protection and of equal protection of the law, by a policy, custom or practice of failure properly to "train, supervise and educate" the two defendant police officers to provide citizens with the protection

of the Act and to apprehend those who commit crimes. (Amended Compl., ¶¶ 87-92). (*See* alleged examples of offending policy by the Roselle defendants, *id.* at ¶¶ 93-109).

Count V (common law count): The failure of all the defendants to protect the decedent from the danger of imminent harm (after being made aware that she was an identifiable victim), constituted a "negligent, gross, callous and wanton disregard for her safety and was the proximate cause of her death." (Amended Compl., ¶ 121).

Now the defendants have brought a motion for summary judgment on all five counts of the amended complaint.

II. DISCUSSION

A. The Summary Judgment Motion

The Court notes that its adjudication of a previous motion by defendants was conducted under a standard more easily met by plaintiff (*i.e.*, failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6)). That earlier adjudication in no way prejudices the Court's analysis of the defendants' present motion. *See, e.g., Wuethrich v. Delia*, 134 N.J. Super. 400 (Law Div. 1975), and *Wuethrich v. Delia*, 155 N.J. Super. 324 (App. Div. 1978).

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 476 U.S. 944 (1986). The Supreme Court recently stated that in applying the criteria for granting summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

To prevail on their motion for summary judgment in the present case, defendant police officers Grabowski and Schwartz must show that as a matter of constitutional law and New Jersey state law (1) they had no duty to provide the decedent with special protection or access to the courts, and (2) they did not provide her with lesser protection because she was a victim of domestic violence. The Roselle defendants must show that even if plaintiff's allegations of failure to train and supervise their employees are taken as true, they cannot be held liable

under § 1983 because these failures do not constitute a policy that caused Evans' injuries.

B. Plaintiff's Causes of Action

1. The Statutory Framework of a Violation of Constitutional Rights Pursuant to 42 U.S.C. § 1983

The civil rights statute (42 U.S.C. § 1983) governs deprivations of constitutional rights, but it does not create substantive rights. The statute simply provides a recovery mechanism for those who have been deprived of such rights. In this case plaintiff alleges that her decedent was deprived of several of her rights. However, because only a deprivation of those rights that are guaranteed by the Constitution forms the substance of a cognizable § 1983 claim, plaintiff's allegations must be of constitutional dimension to merit recovery under the federal statute. *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979). When plaintiff states a cognizable claim which is not "constitutionalized by the fourteenth amendment," he must bring it under state law. *Daniels v. Williams*, 474 U.S. 327, 335 (1986).

2. Denial of Right of Access to the Courts (Count One)

a. The New Jersey Domestic Violence Act

In an opinion dated September 29, 1987, this Court ruled that refusal by the four defendant-movants (Union County Prosecutor's Office, Union County, Prosecutor Stamler and Assistant Prosecutor Daniel) to allow the decedent to file a criminal complaint did not offend her

constitutional rights (Op. at 6-8) because "[i]n American jurisprudence . . . , a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). The Supreme Court held that a private citizen may not institute a criminal complaint as a matter of constitutional right. (*Id.* at 619). Accordingly, as a matter of law, this Court held that plaintiff's claim that decedent Evans was denied access to the courts by failure of the Union County defendants to file or to allow her to file a complaint against Clifton McKenzie was not constitutionally cognizable and must be dismissed.

Plaintiff also alleges, however, that decedent was denied access to the courts by the defendant police officers' failure to inform her of her right to file a civil complaint under the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-1 *et seq.* Defendants counter that while they had a duty not to interfere with decedent's access to the courts, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142 (1907), they had no affirmative duty to help her gain access. The Court disagrees. The policy and wording of the Act create a constitutionally enforceable right for victims of domestic violence in New Jersey. The Act was enacted for the express purpose of enabling these victims to get to court quickly for protection.

> . . . It is therefore the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide. . . . The legislature finds that battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's

> inability to generate a prompt response in an emergency situation.
>
> . . . It is the intent of the Legislature to stress that *the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim.*

(N.J.S.A. 2C:25-2 (in part)) (emphasis added).

The Act implements this policy partly by authorizing a framework for filing domestic violence complaints, pursuant to N.J.S.A. 2C:25-12(a), outside the regular criminal complaint procedure. The policy is further implemented by imposing on police officers a duty to inform victims of domestic violence (such as plaintiff's decedent here) of their right of access to the Juvenile and Domestic Relations Court.[1] The Act states in relevant part:

> A law enforcement officer *shall* disseminate to the victim the following notice, . . . "You have the right to go to the juvenile and domestic relations court and file a complaint requesting relief including but not limited to the following: an order restraining your attacker from abusing you or directing your attacker to leave your household. You may request that the clerk of the court assist you in applying for this order. . . .
>
> On weekends, holidays and other times when the courts are closed, you may go to the municipal court for an emergency order granting the relief set forth above."

(N.J.S.A. 2C:25-7) (emphasis added).

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[1] Now called the Family Part of the Chancery Division of the Superior Court.

In the present case, it is undisputed that Debbie Evans qualified for the Act's protection because she was 18 years of age or older (born October 21, 1958; *see* Defendants' Br., Exh. A), and had shared living quarters with the person of the opposite sex against whom she desired to file a complaint. N.J.S.A. 2C:25-3(a). Further, the decedent alleged to the police defendants that her assailant had committed against her assault, sexual assault and kidnapping, all crimes within the statutory definition of domestic violence. N.J.S.A. 2C:25-3(b). Thus she was a victim for purposes of the Act. N.J.S.A. 2C:25-3(e).

Therefore, even though a state statute like the Act cannot, by itself, create a substantive constitutional right, *see Maine v. Thiboutot*, 448 U.S. 1, 6-11 (1980), the decedent had a constitutionally protected right under those cases establishing a right of access to the civil courts. *See Chambers*, 207 U.S. at 148 (held: right of access partially based on first amendment right to petition for a redress of grievances); *see also Bounds v. Smith*, 430 U.S. 817, 821 (1977) (held: interference with this right of access gives rise to a claim under 42 U.S.C. § 1983). *See also* other cases cited in this Court's opinion of September 29, 1987 at 7.

Defendants contend that they were unaware that Evans had been victimized by domestic violence. However, these defendants had clear knowledge that she had been living with her attacker for a year, as a result of interviewing her at the police station on January 12, 1987, about two days before she was finally kidnapped and

murdered.[2] (Defendants' Br., Exh. B at 4). Defendants' further reliance on the fact that they did nothing to *prevent* Evans from going to court is misplaced. The New Jersey statute creates an affirmative duty in police officers to assist domestic violence victims to get to court. Failure to meet that duty remains "an appropriate basis for plaintiff's claim of deprivation of a constitutionally protected right . . . . " (Op. of Sept. 29, 1987 at 10).

b. Defense of Qualified Immunity

Qualified immunity is a matter of law to be resolved by the court before the case goes to a jury. *Skevofilax v. Quigley*, 586 F. Supp. 532, 538 (D.N.J. 1984); *Czulanis v. Albanese*, 721 F.2d 98, 108 (3d Cir. 1983).

Finally, as to plaintiff's claim of denial of court access: defendants' reliance on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) to support their claims of qualified immunity is unavailing, at least in a summary proceeding. In *Harlow*, the Supreme Court stated that qualified immunity was available to public employees if their actions were reasonable in light of the clearly established law and information in their possession at the time of their actions. (*Id.* at 818). *See also Owen v. City of Independence*,

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[2] Defendants attempt to disassociate the conduct of Officer Schwartz from the conduct of Detective Grabowski and ask that the charges against Schwartz be dismissed. (Defendants' Reply Br., at 23-24). However, the record does not establish that Schwartz and Grabowski operated independently. Therefore, the Court will continue to address the motion presented here in terms of the activities and omissions of the two men together.

443 U.S. 622, 638 (1980). "On summary judgment, the judge appropriately may determine not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818. Although the *Harlow* Court applied the "established law" standard to federal officials, it found no reason to apply a different standard to state officials. (*Id.* at n.30).

The Court is sensitive to the need to avoid "destroy[ing] the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties by making it impossible for officials reasonably [to] anticipate when their conduct may give rise to liability for damages." *Anderson v. Creighton*, ___ U.S. ___, 107 S. Ct. 3034 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). In *Anderson*, the Supreme Court embellished the *Harlow* standard by adding that the "right the official is alleged to have violated" is not "clearly established" unless "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." ___ U.S. ___, 107 S. Ct. at 3039.

For example, if the law affirming the duty of public employees (like the police officers here) to assist victims of domestic violence to gain protection in the civil courts had been new and untested at the time of the police defendants' alleged failure to act, the defense of qualified immunity might be available to them. However, the events that produced this action occurred in January 1985, three to four years after the Act was enacted by the New Jersey Legislature in 1981 and became effective in 1982. (*See* N.J.S.A. 2C:25-1 *et seq.*) Moreover, the police

defendants here knew of the danger of Evans' situation. (Grabowski Dep. (virtually in its entirety); Plaintiff's Br., Exh. D). That knowledge (coupled with the general publicity about the plight of victims of domestic abuse) would bar the defense of qualified immunity for these defendants, even in the absence of case law concerning public employee's affirmative duty to provide access to domestic relations courts. Finally, however, even the *Anderson* standard is satisfied because in *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), a federal court applied equal protection scrutiny to the conduct of local police in a similar domestic abuse situation. Accordingly, the Court finds that in this summary judgment motion defendants should not be awarded judgment on this count on the defense of qualified immunity.

The Court takes no position on the merits of plaintiff's first cause of action for deprivation of Evans' constitutional right of access to the civil courts. However, plaintiff has stated and supported a cognizable claim under 42 U.S.C. § 1983 and the fourteenth amendment, and defendants have been unable to show that, as a matter of law, they are entitled to judgment on this count. Therefore, the two police officer defendants' motion for summary judgment on Count One of the complaint is denied, insofar as it relates to their duties under the New Jersey Domestic Violence Act.

3. Right to Police Protection (Count II)

a. The *DeShaney* Test

In this cause of action plaintiff alleges that Evans was entitled to a "special relationship" with the two

defendant police officers, and thus to police protection against the danger posed by Clifton McKenzie. In opposition, defendants contend that such a claim is not cognizable because of the Supreme Court's recent holding that outside a state-enforced restraint on liberty, a plaintiff has no constitutional right to police protection or other protection by state officers. *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S. Ct. 998 (1989).

The *DeShaney* Court examined the circumstances in which the failure of a state or local government entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights. (109 S. Ct. at 1002). The Court held (under circumstances involving the mental retardation of a young child as a result of a beating by his father after agents of the state had notice of the danger posed by the father to the victim) that the Due Process Clause of the fourteenth amendment is intended only to *prevent* the state from using its power as an instrument of oppression and to protect people from the state. It was not intended to require the state to protect people from each other, except under circumstances where the state had deprived an individual of liberty and thus placed him at a disadvantage in protecting himself. (*Id.* at 1003). *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (held: under the eighth amendment, the state is required to provide adequate medical care to a prisoner in its system); *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (held: the state is required under the fourteenth amendment to provide such services as will reasonably insure the safety of unvoluntarily committed mental patients).

Thus, a state's failure to protect against private violence of which it is aware does not generally constitute a violation of an individual's due process rights. *DeShaney*, ___ U.S. ___, 109 S. Ct. at 1003. Further "[i]f the Due Process Clause does not require the state to provide its citizens with particular protective services, it follows that the state cannot be held liable under the clause for injuries that could have been averted had it chosen to provide them." (*Id.*)

Thus, it is clear that *DeShaney* has preempted the tests (previously employed by this Court in its opinion of September 29, 1987 at 11-12 and found applicable to Evans as a victim of domestic violence) imposed in *Jensen v. Conrad*, 747 F.2d 185,194 (3d Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), to determine whether a special relationship obtained between the state and a victim of injury.[3] Further, this Court determines that the *DeShaney* Court foreclosed the possibility of liability for a state officer in a case like the one at bar. Only "[w]hen the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, . . . and at the same time fails to provide for his basic human needs – e.g. food, clothing, shelter, medical care, and reasonable safety, it transgresses the substantive limits on state action set by . . . the Due Process Clause." (*Id.* at 1005-06). Plaintiff's attempts to portray the police officers' failure to provide Evans with access to a civil court as a restraint upon her liberty are unavailing.

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[3] *See Philadelphia Police and Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, Nos. 88-1883, 89-1116, slip op. at 21 (3d Cir. May 8, 1989), for an analysis of the "broad, harsh" *DeShaney* decision.

The *DeShaney* opinion was set in an eighth amendment context and thus, unlike the circumstances here, implied state custody. Thus, the failure of the police to inform Evans of her constitutional right of access to the appropriate civil court, for the purpose of filing a complaint or seeking a restraining order against the man who later killed her, do not rise to the level of a violation of the officers' constitutional duty to provide for her reasonable safety.

Accordingly, because the *DeShaney* doctrine precludes entitlement to special protection for persons not in state custody or under state deprivation of liberty, plaintiff's claims in Count Two must be dismissed.

4. Equal Protection for Victims of Domestic Violence (Count III)

Clearly, the Court's analysis of the actions of the police defendants under equal protection case law is intertwined with the policies of the Roselle defendants in training and setting standards. However, the Court will discuss the conduct of Schwartz and Grabowski first, in the knowledge that the standards employed must overlap.

a. The *Hynson* and *Thurman* Standards

Plaintiff alleges that the police officers' failure to perform their duties to protect Evans and to provide her with access to the courts pursuant to N.J.S.A. 2C:25-1 *et seq.*, violated Evans' right to equal protection of the law by discriminating against her and affording her lesser

protection because she was the victim of domestic violence. When the state "distribute[s] benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection clause of the Fourteenth Amendment." *Zobel v. Williams*, 457 U.S. 55, 60 (1982) (in the context of Alaska's distribution of surplus revenue).

In order to withstand the motion for summary judgment on this count of the complaint, plaintiff must show that the officers acted with discriminatory intent. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1971); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). The *Watson* court stated that failure to provide equal police protection is subject to the equal protection clause under § 1983. (*Id.* at 694). *See also Thurman v. City of Torrington*, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (held: law enforcement officers can be liable under § 1983 when by their inaction they fail to perform a statutorily imposed duty to enforce the laws equally and fairly).[4]

The *Thurman* court cited a well known pattern and policy of the defendant city to provide no protection to those who made complaints of domestic violence. (*Id.* at 1529). The court required allegations of a pattern of deliberate indifference which caused plaintiff's compensable

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[4] It is true that rights to equal protection are not violated simply by police failure to provide protection to a victim of domestic violence, but only by failure to provide protection to such a victim when ordinary crime victims *would* have received protection. However, it remains defendants' burden in this summary proceeding to establish that the undisputed facts and fair inferences therefrom allow no genuine dispute that Evans received the same treatment as an ordinary crime victim.

injury. (*Id.* at 1530). Such a pattern allows a court to infer discriminatory intent. Similarly, in *Arlington Heights*, the Supreme Court required that a discriminatory motive be alleged. In *Watson*, the court required the plaintiff to show evidence of specific facts that demonstrate a policy of the defendant to provide less protection, and in that case, the plaintiff developed statistics showing a nearly 100% higher arrest rate for perpetrators of nondomestic violence than for perpetrators of domestic violence.

Similarly, in *Hynson v. City of Chester*, 864 F.2d 1026 (3d Cir. 1988), the court held that "in order to survive summary judgment, a plaintiff must proffer sufficient evidence that would [sic] allow a reasonable jury to infer that it is the policy or custom of the police to provide less protection to victims of domestic violence than to other victims of violence, that discrimination was a motivating factor and that the plaintiff was injured by the policy or custom." (*Id.* at 1031).

Here, the plaintiff alleges that the police officers' refusal to protect Evans after hearing her domestic violence report (Plaintiff's Br., Exh. C), coupled with their knowledge of her danger at the hands of her cohabitant and their failure ever to file a domestic violence report on *anyone's* behalf during the period from 1980 to September 1985 (DiGrazia Report, Plaintiff's Br., Exh. S at 7), satisfies the *Thurman* and *Hynson* standards for establishing discriminatory intent sufficient to withstand a summary judgment motion in an equal protection cause of action.

The Court notes that the allegation of failure to provide equal protection in the *third* count of this complaint is brought not against a police department (see analysis

of the fourth count), but against two individual police officers. Plaintiff contends that the *individual* police officers knew of Evans' plight (*see* Plaintiff's Br., Exh. F at 20-22, 24-26 and Exh. G at 35-37), and that they denied her equal protection *because* she was a victim of domestic violence in direct violation of N.J.S.A. 2C:25-2. (*See* Grabowski Dep. at 152; Plaintiff's Br., Exh. D, in which this defendant admits never having filed a domestic violence report). In the absence of matter on the record that Grabowski also never filed an ordinary violence report or that another explanation exists for his failure to file a domestic violence report, defendants have not met their burden in a summary judgment proceeding to show that, as a matter of law, they did not violate Evans' constitutional right to equal protection.

b. Defense of Qualified Immunity

In this summary proceeding, qualified immunity is not available to defendants on the issue of equal protection to victims of domestic abuse. Defendants' claim that reasonable police officers would not know that the policy (of failing to file any domestic violence reports during a five year period) would have a discriminatory impact on victims of domestic abuse strains credulity. *See Hynson v. City of Chester Legal Dep't.*, 864 F.2d 1026, 1032 (3d Cir. 1988). *See also* the treatment of domestic abuse in an equal protection context in *Thurman v. City of Torrington*, 595 F. Sup. 1521 (D. Conn. 1984).

Because plaintiff's substantial allegations of a pattern of discrimination by defendant Grabowski permits an inference of intent to discriminate against victims of

domestic violence, the motion by Officers Grabowski and Schwartz for summary judgment on Count III of the complaint is denied. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

5. Failure of the Three Roselle Defendants to Train Subordinate Officers (Count IV)

The amended complaint states only one federal cause of action against Chief of Police Vincent Trolan, the Roselle police, and the Borough of Roselle. Plaintiff contends that the three Roselle defendants are liable for the acts of the two defendant officers who allegedly denied Evans access to the courts and failed to provide her with the protection she deserved as one with a "special relationship" with the police. (Amended Compl., ¶ 87). Plaintiff cites the Roselle defendants for their failure to train the officers to handle a variety of situations with the public, including providing citizens with access to domestic relations courts. (Amended Compl., ¶ 91). In summary, plaintiff alleges that the acts of the Roselle defendants constitute a policy, custom and practice (further evidence by incidents reported in the City of Roselle Council meetings) of which the result was to deny Evans her constitutional rights. (Amended Compl., ¶¶ 92, 93).

In determining whether a public entity, such as a municipality or a police force, is liable for a violation of a citizen's constitutional rights, the Court must first determine whether the individual officer's action, from which the public entity's liability potentially derives, itself amounted to a constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 798-99 (1986). In earlier sections of

this opinion, the Court denied summary judgment to the two police officers on the question of whether their failure to provide decedent Evans with special police protection, access to the domestic relations court, and equal protection of the law constituted violations of her constitutional rights. Therefore, under *Heller*, it is appropriate to analyze whether the Roselle defendants caused the police officers' failure, if any, to provide Evans with court access, as required by the New Jersey Domestic Violence Act.

The Supreme Court has repeatedly held that establishing the requisite nexus between the acts of an individual public employee and the public entity which employs him constitutes a difficult burden for a plaintiff. No *respondeat superior* or vicarious liability theories are available to the plaintiff under § 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 694-95 (1978). To establish liability on the part of the public entity, the plaintiff must demonstrate affirmative links between the incidents of alleged police misconduct and the adoption of a municipal plan or policy showing the authorization of such misconduct. *Rizzo v. Goode*, 423 U.S. 362, 374-75 (1976). Similarly, in the seminal case of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Court stated that the plaintiff's constitutional rights must have been violated by a municipality's unconstitutional custom or policy to trigger liability under § 1983. (*Id.* at 694-95). Further, "[i]t is only when execution of the government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983."

In *City of Canton v. Harris*, ___ U.S. ___, 109 S. Ct. 1197 (1989), the Supreme Court asked "what degree of fault

must be evidenced by a municipality's inaction before liability will be permitted?" *Id.*, ___ U.S. ___, 109 S. Ct. at 1204. The Court held that "the inadequacy of police training [like that alleged by plaintiffs in the present case] may serve as the basis for § 1983 liability only where failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." (*Id.*) Only if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need," (*id.* at 1205), can the lack of training "fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury." (*Id.*)

In the present case, plaintiff alleges that Roselle Borough had a policy of failure to train officers like defendants Grabowski and Schwartz in handling situations of domestic violence and of failure to weed out incompetents. Plaintiff cites several instances of alleged police dereliction of duty to support her claim. (Amended Compl., ¶¶ 94-110). However, the only relevant allegation in this summary proceeding is that the officers failed to assist an undisputed victim of domestic violence to secure court protection. Some of the instances of alleged police failure and incompetence cited by plaintiff Brown are unrelated either to the handling of domestic violence complaints or to assisting victims of domestic violence to gain court protection.

The Court will make no attempt to evaluate the charges of municipal inadequacy encompassed by this list of alleged failures, even as substantiated by the DiGrazia

report. (Plaintiff's Br., Exh. S). While charges of general inattentiveness and incompetence and failure to train may relate tangentially to failure of officers to perform duties of public protection, the focus of the Court's analysis of city policy under § 1983 is properly limited to the causal *nexus* between any alleged past police failures, and the alleged failure by the police defendants to provide affirmative assistance to a particular victim of domestic violence. As stated in the previous section, plaintiff has substantiated her allegations that the Roselle defendants had (1) a policy of discriminating against victims of domestic violence, as shown by failure to train officers to deal with such situations, and (2) a policy amounting to indifference to a domestic violence victim's rights, as shown by failure to require the filing of even one domestic violence report during the period from 1980 to September 1985 (despite a written report to the Roselle police of another alleged victim of domestic violence). (*See* Mello Dep. at 31-40, Plaintiff's Br., Exh. P; Grabowski Dep. at 152, Plaintiff's Br., Exh. D).

Further, under the *Harris* standard, the duties assigned to the defendant officers to protect the public, including victims of domestic violence, may have rendered their inadequate training so "obvious" and "so likely to result in the violation of constitutional rights [like those set out in this opinion] that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." In this summary proceeding, it cannot be determined, as a matter of law, that "the failure to provide proper training" did not "represent a policy for which the city is responsible." *Harris*, ___ U.S. ___, 109 S. Ct. at 1205.

Accordingly, this Court finds that the deficiency in Roselle's training is properly alleged and is sufficiently closely related to the ultimate injury of the plaintiff to satisfy the *Monell* and *Harris* tests. In other words, plaintiff's uncontroverted claim that *no* domestic violence reports, as required by N.J.S.A. 2C:25-1 *et seq.*, were kept by the Roselle police (Defendants' Answers to Plaintiff's Third Set of Interrogatories; Plaintiff's Br., Exh. R) sustains the nexus requisite, as a matter of law, to preclude summary judgment in these charges of § 1983 liability against the municipality of Roselle and its police force and captain.

With regard to the events of the present case, the Court takes no position on the merits of plaintiff's contention that the defendants' failure to train demonstrates complete indifference to the needs of Debbie Evans. Nonetheless, the Court determines that plaintiffs have raised an inference of a causal link between the alleged denial of court access and equal protection by the two police officers in this case, and a Borough or police force policy implemented by Captain Trolan. Accordingly, as a matter of law, the defendants' motion for summary judgment on Count Four of the amended complaint is denied.

6. Common Law Negligent Failure to Protect an Identifiable Victim in Danger of Imminent Harm (Count V)

In the last count of the complaint plaintiff alleges that all the defendants conducted themselves in a negligent and wanton disregard to the safety of Debbie Evans, and that their actions were the proximate cause of her death. (Amended Compl., ¶ 121). Defendants claim immunity

under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*

In *Wuethrich v. Delia*, 134 N.J. Super. 400 (Law Div. 1975), *aff'd*, 155 N.J. Super. 3244 (App. Div.), *certif. denied*, 77 N.J. 486 (1978), the court explored the framework for determination of liability by public employees under the Tort Claims Act. The court asked "(1) Was this, in fact, a wrong? (2) Was the government responsible for it? (3) Was it the kind of a wrong for which all the taxpayers should be held liable?" (*Id.* at 408). The court held that immunity was available only for high level discretionary acts by municipal employees (*id.* at 410), and that because the duty of police officers to investigate after warnings are received is ministerial, not discretionary, that duty may not be avoided by resort to the Tort Claims Act. (*Id.* at 410-11).

In the case at bar, plaintiff's claims of negligence and disregard for safety against the two police officers stem from their alleged failure to protect Evans from imminent harm by McKenzie. Under the New Jersey Tort Claims Act, there is ordinarily no liability for injuries resulting from a police officer's failure to arrest, N.J.S.A. 59:5-5, or failure to provide police protection. (*Id.* 59:5-4). The *Wuethrich* court found that these kinds of acts were discretionary and necessarily resulted from differing evaluations of probable cause and from a choice among several possible apportionments of police resources. 155 N.J. Super. at 326 (citing *State v. Royal*, 115 N.J. Super. 439 (App. Div.), *certif. denied*, 59 N.J. 294 (1971)).

However, based on this Court's analysis of the affirmative duties imposed on police officers by the explicitly

stated policy by the New Jersey Domestic Violence Act, N.J.S.A. 2C:25-2 (set forth in its entirety above), the Court finds that once they knew of the danger to Evans from her cohabitant (it is uncontested that Officer Grabowski knew of McKenzie's record (Grabowski Dep. at 59-71, 100-104, Plaintiff's Br., Exh. D; Evans Report, Plaintiff's Br., Exh. C), as well as of his absence from the drug rehabilitation center where he was confined and of the assaults and kidnapping he had allegedly perpetrated), the two police defendants here had an affirmative *ministerial* duty to assist Evans to secure court protection, to read her her right to file a civil complaint pursuant to N.J.S.A. 2C:25-7, and to investigate, pursuant to N.J.S.A. 59:2-3(d). No high level discretion, as described in *Wuethrich*, was required to obey the direct instruction of N.J.S.A. 2C:25-7, "A law enforcement officer shall disseminate to the victim the following notice, . . . 'You have the right to go to the juvenile and domestic relations court and file a complaint requesting relief. . . . ' "

The Court makes no prediction regarding the merits of the allegations in Count Five. On the basis of the Act's clear mandate to the police, however, the Court rejects plaintiff's contention that, as a matter of law, the failure of Officers Grabowski and Schwartz to inform Evans of her rights was immune from liability under the New Jersey Tort Claims Act. Therefore, the motion by defendants for summary judgment on Count Five is denied.

III. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment is granted as to Count Two and is denied as to Counts One, Three, Four and Five.

/s/ John W. Bissell

JOHN W. BISSELL
United States
District Judge

DATED: May 25, 1989

UNITED STATES CONSTITUTION, AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

THE PREVENTION OF DOMESTIC VIOLENCE ACT
CHAPTER 25
NEW JERSEY CODE OF CRIMINAL JUSTICE
NEW JERSEY STATUTES ANNOTATED

2C:25-1. Short title

This act shall be known and may be cited as the "Prevention of Domestic Violence Act."

2C:25-2. Legislative findings and declarations

The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; that a significant number of women who are assaulted are pregnant; that victims of domestic violence come from all social and economic backgrounds and ethnic groups; that there is a positive correlation between spouse abuse and child abuse; and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.

The Legislature further finds and declares that even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. The Legislature finds that battered adults presently experience substantial difficulty in gaining access to protection from the judicial system, particularly due to that system's inability to generate a prompt response in an emergency situation.

It is the intent of the Legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim. It is further intended that the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.

2C:25-3. Definitions

As used in this act:

a. "Cohabitants" means emancipated minors or persons 18 years of age or older of the opposite sex who have resided together or who currently are residing in the same living quarters, persons who together are the parents of one or more children, regardless of their marital status or whether they have lived together at any time, or

persons 18 years of age or older who are related by blood and who currently are residing in the same living quarters.

b. "Domestic violence" means the occurrence of one or more of the following acts between cohabitants:

(1) Assault.....N.J.S. 2C:12-1

(2) Kidnapping.....N.J.S. 2C:13-1

(3) Criminal restraint.....N.J.S. 2C:13-2

(4) False imprisonment.....N.J.S. 2C:13-3

(5) Sexual assault .....N.J.S. 2C:14-2

(6) Criminal sexual contact....N.J.S. 2C:14-3

(7) Lewdness.....N.J.S. 2C:14-4

(8) Criminal mischief.....N.J.S. 2C:17-3

(9) Burglary.....N.J.S. 2C:18-2

(10) Harassment.....N.J.S. 2C:33-4

c. "Law enforcement agency" means a department, division, bureau, commission, board or other authority of the State or of any political subdivision thereof which employs law enforcement officers.

d. "Law enforcement officer" means a person whose public duties include the power to act as an officer for the detection, apprehension, arrest and conviction of offenders against the laws of this State.

e. "Victim" means a cohabitant who alleges having been subjected to domestic violence.

2C:25-4. Law enforcement officers; training; domestic crises teams; dispatch to scene of incident of domestic violence

The Police Training Commission in the Department of Law and Public Safety shall provide that all training for law enforcement officers on the handling of domestic violence complaints shall stress the enforcement of criminal laws in domestic situations, the protection of the victim, and the use of available community resources. Law enforcement agencies may establish domestic crises teams or individual officers may be trained in methods of dealing with domestic violence. The teams may include social workers, clergy or other persons trained in counseling, crisis intervention or in the treatment of domestic violence victims. When an alleged incident of domestic violence is reported, the agency shall dispatch a domestic crisis team or specially trained officer, if available, to the scene of the incident.

2C:25-5. Arrests

A law enforcement officer may arrest a person:

a. When the officer has probable cause to believe that a person has violated the terms of an order issued pursuant to section 10, 11, 13 or 14 of this act and that service has been effected either in person or by substituted service. The officer may verify, if necessary, the existence of an order with the appropriate law enforcement agency; or

b. A victim exhibits signs of injury or there is other probable cause to believe that an act of domestic violence has been committed.

2C:25-6. Immunity from liability of law enforcement officer for arrest

A law enforcement officer or a member of a domestic crisis team shall not be held liable in any civil action brought by any party for an arrest based on probable cause, enforcement in good faith of a court order, or any other act or omission in good faith under this act.

2C:25-7. Notice to victim; contents

A law enforcement officer shall disseminate to the victim the following notice, which shall be written in both English and Spanish:

"You have the right to go to the juvenile and domestic relations court and file a complaint requesting relief including but not limited to the following: an order restraining your attacker from abusing you or directing your attacker to leave your household. You may request that the clerk of the court assist you in applying for this order. You also have the right to go to court and file a criminal complaint.

On weekends, holidays and other times when the courts are closed, you may go to the municipal court for an emergency order granting the relief set forth above."

2C:25-8. Domestic violence offense report; completion by law enforcement officer; forwarding information; contents; annual report; information on orders in force or prior incidents

a. It shall be the duty of a law enforcement officer who responds to a domestic violence call to complete a

domestic violence offense report. All information contained in the domestic violence offense report shall be forwarded to the State bureau of records and identification in the Division of State Police in the Department of Law and Public Safety.

b. The domestic violence offense report shall be on a form prescribed by the supervisor of the State bureau of records and identification which shall include, but not be limited to, the following information:

(1) The relationship of the parties;

(2) The sex of the parties;

(3) The time and date of the incident;

(4) The number of domestic violence calls investigated;

(5) Whether children were involved, or whether the alleged act of domestic violence had been committed in the presence of children;

(6) The type and extent of abuse;

(7) The number and type of weapons involved;

(8) The action taken by the law enforcement officer;

(9) The existence of any prior court orders issued pursuant to sections 10, 11, 13 or 14 of this act concerning the parties; and

(10) Any other data that may be necessary for a complete analysis of all circumstances leading to the alleged incident of domestic violence.

c. It shall be the duty of the Superintendent of the State Police with the assistance of the Division of Systems

and Communications in the Department of Law and Public Safety to compile and report annually for a period of 5 years to the Governor, the Legislature and the Advisory Council on Shelters for Victims of Domestic Violence on the tabulated data from the domestic violence offense reports.

2C:25-9. Duties of court

The court in a criminal complaint arising from domestic violence actions:

a. Shall not dismiss any charge or delay disposition of a case because of concurrent dissolution of a marriage, other civil proceedings, or because the victim has left the residence to avoid further incidents of domestic violence;

b. Shall not require proof that either party is seeking a dissolution of a marriage prior to institution of criminal proceedings;

c. Shall waive any requirement that the victim's location be disclosed to any person.

2C:25-10. Release from custody before trial; order of limits on contact with victim

a. When a defendant charged with a crime or offense involving domestic violence is released from custody before trial on bail or personal recognizance, the court authorizing the release may as a condition of release issue an order prohibiting the defendant from having any contact with the victim including, but not limited to, restraining the defendant from entering the victim's residence, place of employment or business, or

school, and from harassing the victim or victim's relatives in any way.

b. The written court order releasing the defendant shall contain the court's directives restricting the defendant's ability to have contact with the victim or the victim's relatives. The clerk of the court or other person designated by the court shall provide a copy of this order to the victim forthwith.

2C:25-11. Conviction of crime or offense involving domestic violence; restriction on contact with victim; professional counseling

When a defendant is found guilty of a crime or offense involving domestic violence and a condition of sentence restricts the defendant's ability to have contact with the victim, that condition shall be recorded in an order of the court and a written copy of that order shall be provided to the victim by the clerk of the court or other person designated by the court. In addition to restricting a defendant's ability to have contact with the victim, the court may require the defendant to receive professional counseling from either a private source or a source appointed by the court, and the court may require the defendant to provide documentation of attendance at the professional counseling.

2C:25-12. Complaint by victim; jurisdiction; filing

a. A victim may file a complaint alleging the commission of an act of domestic violence with the juvenile and domestic relations court in conformity with the rules of court. The court in domestic violence actions shall not

dismiss any complaint or delay disposition of a case because the victim has left the residence to avoid further incidents of domestic violence. Filing a complaint pursuant to this section shall not prevent the filing of a criminal complaint for the same act.

b. The juvenile and domestic relations court shall waive any requirement that the petitioner's place of residence appear on the complaint.

c. The clerk of the court, or other person designated by the court, shall assist the parties in completing any forms necessary for the filing of a summons, complaint, answer or other pleading.

d. Summons and complaint forms shall be readily available at the clerk's office and at the municipal courts.

2C:25-13. Hearing; orders for relief; emergency relief

a. A hearing shall be held in juvenile and domestic relations court within 10 days of the filing of a complaint pursuant to section 12 of this act. A copy of the complaint shall be served on the defendant in conformity with the rules of court. If a criminal complaint arising out of the same incident which is the subject matter of a complaint brought under P.L.1981, c. 426 (C. 2C:25 et seq.) is filed, notice of any hearing on the complaint shall be given to the prosecuting attorney so that he may be heard with respect to a stay of that proceeding pending disposition of the criminal proceeding. At the hearing the standard for proving the allegations in the complaint shall be by a preponderance of the evidence. The court shall consider but not be limited to the following factors:

(1) The previous history of domestic violence between the cohabitants including threats, harassment and physical abuse;

(2) The existence of immediate danger to person or property;

(3) The financial circumstances of the cohabitants;

(4) The best interests of the victim and the child;

(5) In determining custody and visitation the protection of the victim's safety; and

(6) Whether the application was made in a reasonable time after the alleged act of domestic violence occurred.

b. At the hearing the juvenile and domestic relations court may issue an order granting any or all of the following relief:

(1) An order prohibiting the defendant from having contact with the victim including, but not limited to, restraining the defendant from entering the plaintiff's residence, place of employment or business, or school. The court shall prohibit the defendant from harassing the plaintiff or plaintiff's relatives in any way;

(2) An order granting possession to the plaintiff of the residence to the exclusion of the defendant when the residence or household is jointly owned or leased by the parties provided that this issue has not been resolved nor is being litigated between the parties in another action. The court may amend its order at any time upon petition by either party;

(3) When the defendant has a duty to support the plaintiff or minor children living in the residence or household and the defendant is sole owner or lessee of the residence, an order granting possession to the plaintiff of the residence or household to the exclusion of the defendant may be issued or, upon consent of the parties, allowing the defendant to provide suitable, alternate housing provided that this issue has not been resolved nor is being litigated between the parties in another action;

(4) When the parties are married, sole ownership in the name of the defendant of the real property constituting the residence of the parties shall not bar the court from entering an order restraining the defendant from entering the marital residence. No order shall affect any interest in the residence held by either party;

(5) An order determining child support, child custody, or establishing visitation rights, provided that these issues have not been resolved nor are being litigated between the parties in another action. The court shall protect the safety of the plaintiff by specifying a place of visitation away from the plaintiff or take any other appropriate precaution necessary to protect the safety and well-being of the plaintiff and minor children;

(6) An order requiring the defendant to pay to the victim monetary compensation for losses suffered as a direct result of the act of domestic violence. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses, reasonable attorney's fees and compensation for pain and suffering. Where appropriate,

punitive damages may be awarded in addition to compensatory damages;

(7) An order requiring the defendant to receive professional counseling from either a private source or a source appointed by the court and, in that event, at the court's discretion requiring the defendant to provide the court at specified intervals with documentation of attendance at the professional counseling. The court may order the defendant to pay for the professional counseling.

c. In addition to the relief sought in subsection b. of this section a plaintiff may seek emergency, ex parte relief in the nature of a temporary restraining order. The juvenile and domestic relations court may enter ex parte orders when necessary to protect the life, health or well-being of a victim on whose behalf the relief is sought. A hearing shall be held on an ex parte order within 10 days of the issuance thereof.

Whenever emergency relief is sought by the plaintiff the clerk of the court or other person designated by the court shall immediately transmit the complaint to the presiding juvenile and domestic relations court judge regarding the emergency relief sought by the close of business on the day relief is sought. An order granting emergency relief shall immediately be forwarded to the sheriff for immediate service of the order for emergency relief upon the defendant.

d. An order for emergency relief shall be granted upon good cause shown.

e. Emergency relief may constitute all relief available under this act together with any other appropriate

relief. A temporary restraining order shall remain in effect until further action by the court.

f. Notice of orders issued pursuant to this section shall be sent by the clerk of the juvenile and domestic relations court or other person designated by the court to the appropriate chiefs of police, members of the State Police and any other appropriate law enforcement agency.

g. All pleadings, process, and other orders filed pursuant to this act shall be served upon the defendant in accordance with the rules of court. If personal service cannot be effected upon the defendant, the court may order other appropriate substituted service.

2C:25-14. Temporary restraining order; jurisdiction; duration

a. On weekends, holidays and other times when the court is closed a juvenile and domestic relations court judge or a municipal court judge shall be assigned to issue a temporary restraining order pursuant to this act. The order shall be made by the judge of the jurisdiction where the alleged domestic violence occurred or the jurisdiction where the plaintiff resides using the same procedure now available on other emergent applications.

b. If it appears that the plaintiff is in danger of domestic violence, the municipal court judge shall, upon consideration of the plaintiff's domestic violence complaint, order emergency relief including ex parte relief, in the nature of a temporary restraining order. A decision shall be made by the judge regarding the emergency

relief forthwith. An order granting emergency relief, together with all pleadings, process and other orders, shall immediately be forwarded to the sheriff for immediate service of the order for emergency relief upon the defendant.

c. An order for emergency relief shall be granted upon good cause shown and shall remain in effect until the juvenile and domestic relations court issues a final order. The juvenile and domestic relations court shall hold a hearing on an emergency order within 10 days. Any order hereunder may be dissolved or modified on 24 hour's notice or immediately appealable for a plenary hearing de novo not on the record before the juvenile and domestic relations court of the county in which the plaintiff resides.

d. Emergency relief may include forbidding the defendant from returning to the scene of the domestic violence together with any other appropriate relief.

e. The judge may permit the defendant to return to the scene of the domestic violence to pick up personal belongings and effects but may by order restrict the time and duration and provide for police supervision of such visit.

f. Notice of temporary restraining orders issued pursuant to this section shall be sent by the clerk of the court or other person designated by the court to the appropriate chiefs of police, members of the State Police and any other appropriate law enforcement agency.

g. An application for a temporary restraining order pursuant to this section shall, upon filing and issuance,

be immediately forwarded to the clerk of the juvenile and domestic relations court of the plaintiff's vicinage for a final order.

2C:25-15. Accompaniment to residence for removal of personal belongings; violations of orders; contempt

a. Upon the issuance of an order pursuant to sections 10, 11, 13 or 14 of this act the court may order a law enforcement officer to accompany either party to the residence to supervise the removal of personal belongings in order to insure the personal safety of the plaintiff.

b. Violation of an order issued pursuant to sections 10, 11, 13 or 14 of this act shall constitute contempt and each order shall so state.

2C:25-16. Uniform record of requests for orders; annual report; confidentiality

The Administrative Office of the Courts shall maintain a uniform record of all requests for orders issued pursuant to section 10, 11, 13, or 14 of this act. The record shall include the following information;

a. The number of complaints filed by the parties;

b. The sex of the parties;

c. The relationship of the parties;

d. (Deleted by amendment, P.L.1982, c. 82.)

e. The relief sought;

f. The nature of the relief granted including but not limited to, custody and child support;

g. The effective date and terms of each order issued; and

h. The number of orders issued.

It shall be the duty of the Director of the Administrative Office of the Courts to compile and report annually to the Governor, the Legislature and the Advisory Council on Shelters for Victims of Domestic Violence on the data tabulated from the records on these orders for a period of 5 years. The Advisory Council on Shelters for Victims of Domestic Violence may request the Legislature continue the reports for another 5 years.

All records maintained pursuant to this act shall be confidential and shall not be made available to any individual or institution except as otherwise provided by law.

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

No. 90-1680

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Petitioner,

vs.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LINDSEY H. TAYLOR
Counsel of Record
FRIEDMAN SIEGELBAUM
Attorneys for Respondents
Seven Becker Farm Road
Roseland, New Jersey 07068
(201) 992-1990

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner has asked this Court to review the decision rendered in this matter by the United States Court of Appeals for the Third Circuit. She contends that the Court below erred when it held that the right of a victim of domestic violence to receive the same

protectior
as of Jan on as a victim of other crimes was not clearly established
Harlow v nuary, 1985 for purposes of qualified immunity under
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have not l and (b), nor any important issues of federal law which
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considera as misstated some of the facts relevant to this Court's
follow, P ation of the issues raised herein. For the reasons that
denied. Petitioner's petition for writ of certiorari should be

I

DEBBIE EVANS' RIGHTS WERE NOT CLEARLY ESTABLISHED FOR PURPOSES OF ANDERSON V. CREIGHTON

Petitioner seeks review of the holding of the Third Circuit that Debbie Evans' right to not be provided with less police protection because she was a victim of domestic violence was not "clearly established" in January, 1985 for purposes of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). For the reasons that follow, the decision of the Court below was both correct and was in accordance with the law of the other Circuits as to what constitutes "clearly established" law. Therefore, Petitioner's petition should be denied.

A government official is entitled to qualified immunity against claims that he violated a citizen's constitutional rights where those rights were not clearly established at the time of the allegedly wrongful conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* The right allegedly violated must be clearly established in a particularized sense.

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The Court below held that the law regarding discrimination against victims of domestic violence was not clearly established for purposes of *Harlow* because only a single District Court

case from another Circuit, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984), had held that such discrimination was unlawful.

> Our survey of these cases and materials strongly suggests that, in 1985, the equal protection rights of domestic violence victims were far less recognized and defined than they are today. We believe that *Thurman*, *see supra* note 13, a lone district court case from another jurisdiction, cannot sufficiently have established and limned the equal protection rights of a domestic violence victim, such as Evans, to enable reasonable officials to " 'anticipate [that] their conduct [might] give rise to liability for damages.' " *Anderson*, 483 U.S. at 646, 107 S.Ct. at 3042 (quoting *Davis*, 468 U.S. at 195, 104 S.Ct. at 3019).

922 F.2d at 1118; App. at App. 49. The Third Circuit's view that a single District Court decision from another Circuit does not "clearly establish" the law for purposes of qualified immunity is in accord with every other Circuit which has considered the question. *See Muhammad v. Wainright*, 839 F.2d 1422, 1425 (11th Cir. 1987) ("A single district court opinion, particularly from outside the circuit, cannot, in and of itself, settle the law."); *Hawkins v. Steingut*, 829 F.2d 317, 312 (2d Cir. 1987) ("A district court decision does not "clearly establish" the law even of its own circuit, much less that of other circuits"). *See also Hedge v. County of Tippacanoe*, 890 F.2d 4, 7-8 (7th Cir. 1989); *Hensley v. Wilson*, 850 F.2d 269 (6th Cir. 1988) (single opinion from other Circuit court does not "clearly establish" law). Thus, since there is unanimity among the circuits that a single case cannot "clearly establish" the law for purposes of qualified immunity, there is no reason for this Court to exercise its supervisory powers to answer a question that has clearly been answered by the lower courts.

Petitioner contends that Debbie Evans' right not to receive less police protection because she was a victim of domestic violence was clearly established in 1985, relying upon several Supreme Court decisions regarding discrimination. These cases,

however, did not so "clearly establish" the law so that a reasonable official would know that his actions would violate a domestic violence victim's constitutional rights.

On a most general level, there is no question that in January, 1985 it was clearly established that it was a violation of the equal protection clause for an official to treat similarly situated persons differently.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886). The real question under equal protection analysis is whether a person or group is similarly situated to another group so as to be entitled to the same treatment as the other group. Petitioner cites to four cases from this Court which she contends "clearly established" the law that victims of domestic violence were entitled to be treated the same as victims of other crimes: *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); and *Reed v. Reed*, 404 U.S. 71 (1971). At best, these cases "clearly establish" that irrational distinctions based upon gender violate the Equal Protection Clause. It cannot fairly be said, based upon these cases, that a reasonable official would know that discrimination against domestic violence victims, a subclass of women, would be unconstitutional.

Feeney established a two-part test for determining whether a statutory classification discriminated against women. To make such a determination, a court must first consider whether the classification is indeed gender-neutral. If the classification is facially gender-neutral, the court must go on to consider whether an adverse effect against a given gender reflects invidious gender

based discrimination. *Feeney*, 442 U.S. at 274. Using this test, the Court upheld a Massachusetts statute which gave hiring preference for state jobs to veterans, even though veterans were primarily men. In the other cases relied upon by Petitioner, the Court struck down as unconstitutional explicit, irrational gender-based classifications. *See Craig*, *supra* (drinking age 21 for males, 18 for females); *Frontiero*, *supra* (male service members automatically received dependency allowances for spouses; female service members had to prove dependency); *Reed*, *supra* (statute favoring males over females as administrators of estates).

Petitioner's argument that the foregoing cases which clearly established that irrational discrimination against women violated against the equal protection likewise "clearly established" that domestic violence crimes be treated the same as other crimes is precisely the sort of argument that *Anderson* was designed to protect against. Under Petitioner's reasoning, any action which was ultimately found to have an adverse impact on women, or a group of women, would be unconstitutional, despite the holding of *Feeney*.

> If the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson, 483 U.S. at 639. "A passably clever plaintiff would always be able to identify an abstract clearly established right

that the defendant could be alleged to have violated." *Anderson*, 483 U.S. at 640, n.2. It is a quantum leap to say that cases which established that irrational discrimination against women is unconstitutional likewise "clearly established" for purposes of qualified immunity that victims of domestic violence, a subclass of women,[1] should be given the same treatment as the victims of other crimes.

The Supreme Court cases cited by Petitioner would hardly "both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Assn's v. Seiter*, 858 F.2d 1171, 1177 (6th Cir. 1988). In January, 1985 there was but a single case, from a District Court in another Circuit, which had held that domestic violence crimes were not, in fact, different crimes which should be handled differently than other crimes. There is no disagreement among the Circuits that such scant authority does not "clearly establish" the law for purposes of qualified immunity. It is equally clear, contrary to petitioner's suggestion, that the New Jersey Domestic Violence Act did not "clearly establish" Debbie Evans' *constitutional* rights, because a state statute cannot create a federal constitutional right. *See Maine v. Thiboutout*, 448 U.S. 1 (1980).

As set forth above, there is no conflict among the Circuits that a single case from a District Court in another Circuit does not

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[1] The class of victims of domestic violence victims, according to the authorities cited by petitioner, consists primarily, although not exclusively, of women. Petitioner states in her petition, "In the Borough of Roselle, the class of domestic violence victims was comprised almost exclusively of women." (Pet. at 12). While Petitioner has cited to numerous law review articles, studies and some cases that, in general, women are primarily the victims of domestic violence, she has produced no *evidence* as to the distribution between the sexes of domestic victim violence in Roselle, N.J. Further, it is Respondents' position that Petitioner has likewise produced no evidence to show that Debbie Evans, or other domestic violence victims, received *unequal* treatment by the Roselle police, even assuming that it was clearly established in 1985 that such discrimination was wrongful. This issue was not, however, reached by the Third Circuit.

"clearly establish" a constitutional right for purposes of qualified immunity. Petitioner is simply seeking to have the Court review the application of its standard set forth in *Anderson v. Creighton* to a specific factual situation, where the court below correctly applied *Anderson*. Since the incident which forms the subject matter of this suit, the Circuits have clearly, and universally, held that discrimination against victims of domestic violence is a violation of the equal protection clause. *See Hynson v. City of Chester, Legal Dept.*, 864 F.2d 1026 (3d Cir. 1988); *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988). A holding by this Court that such conduct was clearly established as wrongful in 1985 would affect only a handful of cases.

Petitioner has shown no need for this Court to exercise its supervisory powers under Supreme Court Rules 10.1(a) and (b), nor is this an important question of federal law which should be settled by this Court under Rule 10.1(c). Therefore, Petitioner's petition for writ of certiorari should be denied.

II

THE COURT BELOW FOUND THAT RESPONDENTS DID NOT INTERFERE WITH DEBBIE EVANS' RIGHT OF ACCESS TO THE COURTS

Petitioner also argues that Respondents violated Debbie Evans' clearly established right of access to the courts by actively interfering with her attempts to file criminal charges and obtain a protective order. This continuation is contrary to the factual findings of the Court below.

There is no question but that a citizen's right to access to the court is protected by the Constitution. *See Wolff v. McDonnell*, 418 U.S. 539 (1974); *California Motor Transportation Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907). Affirmative interference with access to the civil courts is a constitutional violation. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). However, the state has an obligation to assist a citizen in gaining access to the courts only where the citizen is in custody. *See Bounds v. Smith*, 430 U.S. 817 (1977). *Cf. DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) (state has obligation to protect citizen against third-party violence only when citizen is in custody). Petitioner has also cited to three post-*DeShaney* decisions which hold that the state has an obligation under the Constitution to protect citizens against dangers that the state itself creates. *Gregory v. City of Robers*, 921 F.2d 750 (8th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989).

Petitioner argues that Debbie Evans' clearly established right to access to the court was violated because Det. Grabowski actively interfered with her access to the court and assisted in creating the danger to Ms. Evans. (Pet. at 22-23, 26). This argument is directly contrary to the factual findings of the court below. While acknowledging the rule set forth in *Cornelius* and *Wood*, the Third Circuit found that those cases were factually distinguishable.

> In the case at bar, the evidence that plaintiff has adduced with respect to Schwartz is gossamer. Plaintiff's evidence establishes only that Schwartz took Evans' statement and, consistent with Roselle police policy, passed on the information that he obtained to Detective Grabowski for further investigation and action. Plaintiff, moreover, has provided no evidence that Grabowski, the officer assigned to Evans' case, in any way constrained either her general liberty or her freedom of her own accord to seek protection from McKenzie in the civil courts. Plaintiff also has failed to supply any evidence that either Schwartz or Grabowski had custody of McKenzie prior to his initial kidnapping and assault of Evans – a factor that might have triggered a constitutional duty on their parts to assist Evans subsequently in obtaining court protection from him. Indeed, McKenzie, like the individual who murdered the plaintiff's decedent in *Martinez*, was a parolee subject only to the limited control of a state parole board.
>
> * * *
>
> Finally, from a more factual perspective, plaintiff has adduced insufficient evidence to create a genuine issue of material fact as to her claim that Grabowski, much less Schwartz, acted so as to create a special relationship with Evans, triggering a constitutional duty to assist her in obtaining protection from McKenzie in the civil courts. Plaintiff has provided no evidence to show, as *DeShaney* would appear to require, that either defendant affirmatively barred the door to the civil courts to Evans, that he otherwise limited her freedom to act on her own behalf, or that he created or exacerbated the danger that McKenzie posed to her.

922 F.2d at 1115-1116; App. at 42, 44. Thus, contrary to what petitioner would have the Court believe, that the Third Circuit misapprehended the applicable legal rules, the court below ruled

against Petitioner because she failed to prove her case in accordance with the rule of law she is advancing. Petitioner's argument regarding access to the courts does not present an important question of law to be decided by the Court. She only presents a factual question which was previously, and correctly, decided by the Third Circuit. As a result, Petitioner's petition should be denied.

CONCLUSION

For the reasons contained herein, Petitioner's petition for writ of certiorari should be denied.

LINDSEY H. TAYLOR
Counsel of Record
FRIEDMAN SIEGELBAUM
7 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-1990

(3)

No. 90-1680

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In The

Supreme Court of the United States

October Term, 1990

REGINA BROWN, Administratrix and Administratrix Ad Prosequendum of the Estate of Debbie Evans,

Petitioner,

v.

DETECTIVE FELIX GRABOWSKI, individually and as a police officer of the Roselle Police Department, New Jersey; PATROLMAN WILLIAM SCHWARTZ, individually and as a police officer of the Roselle Police Department, New Jersey; CHIEF VINCENT F. TROLAN, individually and as Chief of the Roselle Police Department, New Jersey; ROSELLE POLICE DEPARTMENT; and THE BOROUGH OF ROSELLE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
* Counsel of Record

Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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POINT I

THE RIGHT OF FEMALE DOMESTIC VIOLENCE VICTIMS TO EQUAL PROTECTION OF THE LAW WAS CLEARLY ESTABLISHED IN 1985

Respondents incorrectly contend that Debbie Evans' right to equal protection, as guaranteed by the fourteenth amendment, was not clearly established for purposes of satisfying the standard set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987). By contending that the law was not clearly established in 1985, respondents assert that it was permissible for police officers to treat female victims of domestic violence differently from other crime victims. Respondents' position is premised on the argument that no decision within the Third Circuit had previously ruled that the complained of conduct was unlawful.

A specific, binding precedent is not required to show that a right is clearly established in defeat of a claim of qualified immunity. *Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). In the absence of binding precedent, a court should look at all available decisional law to determine whether a right is clearly established. *Id.; Hedge v. County of Tippecanoe*, 890 F.2d 4, 7 (7th Cir. 1989) ("In the absence of a controlling precedent we look to all relevant case law in an effort to determine whether at the time of the alleged acts a sufficient consensus had been reached indicating that the official's conduct was unlawful"). Therefore, the presence of controlling precedent is not a necessary requirement to find that a particular right has been clearly established for purposes of overcoming qualified immunity. *Hedge*, 890 F.2d at 7.

The approach to take where no binding precedent exists is to assess the direction in which the law is heading. "To state the proposition in another way, we seek to determine whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 431 (7th Cir. 1989), *cert. denied*, 111 S. Ct. 368 (1990).

At the time Ms. Evans sought the assistance of the Roselle Police Department, one case had recognized that police conduct treating victims of domestic violence differently from other assault victims constituted gender-based discrimination violative of the equal protection clause. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). The ruling in *Thurman* represented a critical point in recognizing the tragic harm that has resulted due to the refusal by law enforcement authorities to view domestic violence as a "real crime." The Third Circuit took notice of this trend in *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026 (3d Cir. 1988), and held that female domestic violence victims had a clearly established right to equal protection of the law. The decision in *Hynson*, just three years after the tragic murder of Debbie Evans, shows that recognition of this right truly was "merely a question of time." *See Cleveland-Perdue*, 881 F.2d at 431. Analyzing whether the trend in the law is pointed towards recognition of the asserted right "makes eminent sense for it precludes an individual from escaping liability for unlawful conduct due to the fortuity that a court in a particular jurisdiction had not yet had the opportunity to address the issue." *Id.; Hedge*, 890 F.2d at 7.

With regard to respondents' attempt to refute petitioner's argument that their conduct violated the equal protection clause by treating female domestic violence victims differently from other crime victims, respondents obviously misunderstand the legal reasoning of *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979), which sets forth a two-part analytical framework to assess whether unconstitutional gender discrimination has occurred. Contrary to respondents' mistaken belief that "[u]nder Petitioner's reasoning, any action which was ultimately found to have an adverse *impact* on women . . . would be unconstitutional," petitioner's analysis is focused, not on the disproportionate impact caused by the conduct of the Roselle Police but, rather, on the invidious discrimination toward women which results in the disproportionate impact on females. Brief in Opposition at 6 (emphasis added).

Respondents note that petitioner has "produced no *evidence* as to the distribution between the sexes of domestic victim violence in Roselle, N.J." Brief in Opposition at 7 n.1 (emphasis in original). The reason no such evidence exists to document the discriminatory enforcement of the law in Roselle, unlike numerous studies elsewhere, is quite simple: the borough maintained no records whatsoever regarding domestic violence incidents despite requirements under the law to do so. *See* N.J. Stat. Ann. § 2C:25-8 (West 1982).

The concluding remarks by respondents that the Court should not accept this petition because "only a handful of cases" would be affected by a ruling flies in the face of all notions of justice and decency. Certainly, the matter is no less important to the family of Debbie

Evans who patiently have waited too many years in an attempt to see that justice be done. The issue constitutes an important question of federal law that should be resolved by the Court.

POINT II

THE ROSELLE POLICE VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY TREATING DOMESTIC VIOLENCE VICTIMS DIFFERENTLY FROM OTHER VICTIMS OF VIOLENT CRIMES WITHOUT ANY RATIONAL BASIS FOR SUCH A DISTINCTION

Respondents' brief in opposition neglects to address the failure by the Third Circuit to analyze petitioner's allegations of constitutional violations in terms of whether there was a rational basis to support the differential treatment of domestic violence victims from victims of nondomestic violence. Since the opinion of the Third Circuit runs counter to decisions of the Supreme Court and departs from the accepted and usual course of judicial proceedings, the Court should grant the petition for a writ of certiorari pursuant to Rule 10.1(a) and (c).

POINT III

THE ROSELLE POLICE VIOLATED THE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS OF DEBBIE EVANS BY DENYING HER ACCESS TO THE COURTS

Respondents violated Debbie Evans' constitutional rights by actively interfering with her right of access to

the courts. By misrepresenting material information to the assistant prosecutor, Detective Grabowski denied Ms. Evans access to the criminal courts. His conduct thereby triggered a duty to inform her of the right to obtain a restraining order, pursuant to the New Jersey Prevention of Domestic Violence Act. The Prevention of Domestic Violence Act provided a means of access to the judicial system. In the context of this case, the violation of this statute along with respondents' affirmative acts which blocked Debbie Evans from obtaining judicial relief constituted a violation of her right of access to the courts.

As previously argued, this matter is distinct from the Court's decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989). Petition at 23. That decision has since resulted in confusion among the courts of appeals regarding the magnitude of state involvement required before giving rise to a constitutional duty to protect. Petitioner submits that this matter is no different than those addressed in other circuits which have found that the state bore an affirmative duty to provide assistance. *E.g.*, *Gregory v. City of Rogers*, 921 F.2d 750, 754 (8th Cir. 1990); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1784 (1990); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990). *See* Petition at 24-25. Thus, a major gap exists between this Court's decision in *DeShaney* and the manner in which it has been applied by the various circuits.

An important question of federal law remains unsettled and should be resolved by this Court. The grim alternative is the perpetuation of these divergent approaches pursued by the circuits in interpreting the

Court's difficult decision in *DeShaney*. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

* Barry T. Albin, Esq.
James E. Trabilsy, Esq.
Richard P. Jacobson, Esq.
* Counsel of Record

Wilentz, Goldman & Spitzer
A Professional Corporation
90 Woodbridge Center Drive
P.O. Box 10
Woodbridge, New Jersey 07095
(908) 636-8000
Attorneys for Petitioner

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